



# WATER LOG

*A Newsletter for the Mississippi-Alabama Sea Grant Consortium*

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## 1985 MISSISSIPPI WATER LAW AMENDMENTS — \*Al Sage

### Introduction

The 1985 Session of the Mississippi Legislature produced two significant pieces of legislation concerning water law. House Bill 762 (Chapter 459, Laws of 1985) substantially altered the permit system for surface water use and added ground water to that permit scheme. House Bill 149 (Chapter 481, Laws of 1985) authorized the creation of a new type of water management district. Both of these acts are important because they represent a huge step toward management of water resources in a comprehensive and coordinated manner, rather than the piecemeal fashion of the past. [For a discussion of the law prior to 1985, see 3 *Water Log* 1 (Jan-March, 1983).]

### Surface and Ground Water Permitting

House Bill 762 creates a general permit scheme for both surface and ground water. The formerly utilized doctrine of prior appropriation was eliminated as a method of allocation for surface water. Under prior appropriation, any person (even those not bordering a watercourse) may acquire a right to withdraw water from a watercourse as long as the water is put to beneficial use. Once acquired, this right is superior to any subsequent appropriation. However, the rights of previous holders of surface water permits are preserved if the permit holder files a notice of claim within three years of the effective date of the Act. No specific allocation method was mandated in its place. Instead, it is anticipated that specific guidelines will follow the development of a statewide water management plan, mandated by the law, and the adoption of regulations in accordance with such a plan. Leaving the specifics of a regulatory program to the regulatory agency will allow maximum flexibility and, if definitive standards are needed, they can be added at a later date.

Ground water was included in the permit system to achieve uniformity and to encourage conjunctive use. The only previous ground water regulation system is found in the "capacity use" program, which was not repealed. This system has never been put into effect. It requires a decision of the Commission on Natural Resources to declare an area a "capacity use area." Such a decision would be extremely difficult to make politically, and no such declaration has ever been made, despite the fact that several areas of the state have serious ground water problems. As with surface water, previously existing ground water rights can also be preserved by filing a notice of claim.

There are three exemptions in the new law from the permit requirements. These are: (1) all domestic uses, defined as ordinary household

purposes, livestock, poultry and domestic animals, and irrigation of home gardens and lawns; (2) all wells with a surface casing diameter of six inches or less; and (3) uses of surface water from impoundments not located on continuous, free-flowing watercourses.

Withdrawals from stream waters can be permitted only if there is water in excess of the established minimum flow for the watercourse. An exception is made for municipal and other uses where the water is returned to the stream, thereby maintaining minimum flow. If the return point is downstream, and other property owners are not affected, or if the public interest is sufficient, industrial uses below minimum flows may be permitted. Minimum lake levels are also to be established and only two types of uses may be permitted below such levels: (1) municipal uses, or (2) following a hearing on the exception, uses which do not adversely affect the proper utilization of the state's water resources. Lake levels above minimum levels are authorized if the Commission feels proper utilization of the state's resources requires the higher level.

The statute prohibits uses which impair pollution control standards based on minimum stream flows and which would impair navigability. The mining of an aquifer is prohibited unless the use is essential to safety of human life and property or unless the person demonstrates that he is pursuing a plan to acquire water from another source and that he has the financial ability to accomplish the plan.

While water policy under the new permit system is to be set by the Commission on Natural Resources, permits are issued by the state Permit Board (which presently issues only pollution control permits). Several new officials were added to the Board's previous composition. In addition, two private citizens are authorized to be appointed to the Board for issuance of water permits only. These latter two must be a qualified water engineer and a nominee of the state Water Well Contractor's Association.

Permits will be issued for a ten year duration and must be renewed or the rights thereunder are lost. Notices will be sent prior to the expiration of permits. Rights that arose and were preserved under prior law are retained. But these permits must be renewed every ten years as well. The law specifies that permits will be reissued unless continued use is contrary to the public interest. A permit can be terminated or modified for "good cause" after a hearing. (The previous provision for termination for three years consecutive nonuse was repealed because permits under the new system have a definite duration.) All permit

applications shall be approved as long as the use (1) is a beneficial one, (2) is not inconsistent with standards set by the Commission, and (3) does not prejudice the public interest. The Commission may require any permit holder to file reports, and may require any user of over 20,000 gallons per day to file such reports.

The Commission has substantial regulatory powers, including administrative determination of rights, well depth and spacing, timing of withdrawals, and provisions to protect against unreasonable adverse effects on other water users within the area. The Commission is the enforcement authority for the Permit Board when the Board determines that the sanctions available to it are not sufficient to achieve compliance with its orders. Civil and criminal penalties and fines are authorized.

### State Water Management Plan

There are extensive guidelines for the formulation of the state water management plan, which is the responsibility of the Commission. The Commission is given broad power to designate uses of water for a particular source of supply when restrictions on use are in the public interest and promote water resources in the area. The law empowers the Commission to delegate to a water management district the authority to assist in the preparation, administration and implementation of the state water management plan in the district.

### Dam Safety Law

The Act also substantially amends the Dam Safety Law. The most important provision provides for exemptions for any dam less than eight feet in height, regardless of storage volume; any dam less than twenty-five acre feet of storage volume, regardless of height; or any dam that does not impound a watercourse with a continuous flow. The permit required under this section is not a permit for the use of water, but a permit to construct the dam. A permit to use the water impounded by a dam must still be obtained just as with any other water, unless such use is exempt as previously mentioned. The Permit Board can order repairs to a dam which has not been safely maintained.

### Joint Water Management Districts

House Bill 149 authorizes the creation of a joint water management district between or among governmental entities that previously had not been statutorily authorized. Two or more local governmental entities can form a district; i.e., two towns or two counties or a town and a county can form a district. There are several variations on this theme. For example, the number of governmental entities is not restricted to two and the towns do not have to be in the same county. This principle

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## MARINE SANCTUARIES: A CASE STUDY OF THE FLOWER GARDEN BANKS

### Introduction

The Marine Sanctuaries Program, created by Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, provides that the Secretary of Commerce may designate ocean and coastal waters as marine sanctuaries. 16 U.S.C.A. §§ 1431-1434 (West 1985). The purpose behind such designation is to preserve and restore marine areas for their protection and conservation and for their recreational, ecological or aesthetic values for the long term benefit and enjoyment of the public. The Secretary, after consultation with other interested federal agencies, can issue necessary and reasonable regulations required to control any activities which would threaten the features of the area which led to its designation as a sanctuary.

The Marine Sanctuaries Program is administered through the Office of Ocean and Coastal Resource Management under the authority of the National Oceanic and Atmospheric Administration (NOAA). The first stage of designation under existing regulations is the establishment of a Site Evaluation List (SEL). Following a review and evaluation process, appropriate sites are placed on an Active Candidate list.

Once a site becomes an Active Candidate, an environmental impact statement and a draft management plan are developed, specifying goals and objectives, management responsibilities, resource studies, interpretive and educational programs and applicable regulations.

Of primary concern in this article is the Flower Garden Banks, now on the Active Candidates list, and the only marine sanctuary likely to be designated in the Gulf Coast area in the near future. The Flower Garden Banks represent a diverse coral reef community within the northern Gulf of Mexico and a significant regional site. Because there are no other designated or proposed national marine sanctuaries within the Gulf, Flower Garden Banks could fill a substantial niche in the national system. While two coral reef areas along the Florida reef tract have been established as sanctuaries, they represent outer bank coral reefs that differ substantially from the non-connected topographical highs represented by East and West Flower Garden Banks.

### Description of the Area

The East and West Flower Garden Banks, situated approximately 16 miles apart, and located 123 miles due south of Sabine Pass, Texas, represent the northernmost thriving, shallow-water, tropical coral reef community in the Gulf of Mexico. Formation of the reefs is related to upward intrusions of salt plugs from deeply buried deposits. Both banks are surrounded by clear waters up to 325-390 feet deep. The living reefs rise from a depth of 148 feet to a crest at 66 feet. Because of their prominent relief, the banks are bathed almost perpetually by clear warm ocean waters.

The ecology of Flower Garden Banks is of special interest. The Banks support the most ecologically complex and biologically productive reef communities on the Texas-Louisiana outer continental shelf. The composition, diversity, and vertical distribution of the marine communities located along the ocean bed arguably merit

further investigation. With over 200 species of benthic invertebrates inhabiting the depths of the ocean bed and more than 100 fish species found at the East and West Banks, many of these inhabitants are not recorded elsewhere in the northern Gulf of Mexico. Both Banks are covered with thriving coral reef communities which, except for lack of shallow-water soft corals, are good examples of the reef-building community so common on reefs in the Caribbean. The proposed sanctuary boundary, which comprises a 44 square mile area, follows a 100 meter isobath (less than 328 feet) around each midpoint. Commercial fishing in the area is common. The Banks are believed to be an important nursery area for brown shrimp and, therefore, important to the commercial shellfishing industry. Because of their distance from shore, the Banks are rarely frequented by recreational divers and fisherman.

The area has great potential for scientific research. Thus far, the majority of research has been conducted by Texas A & M University. The first phase—collection dives, transect surveys and submersible reconnaissance—is nearing completion. This phase has yielded descriptive, systematic and quantitative data on coral species. Such sedimentological studies provide insight into the geological history of the Gulf of Mexico basin and the formation of land and oceans.

### Past History

On April 13, 1979, NOAA published regulations and a draft environmental impact statement (DEIS) for designating the East and West Flower Garden Banks as a national marine sanctuary. 44 Fed. Reg. 22,081 (1979). On October 31, 1979, the Flower Garden Banks were placed on the List of Active Candidates. 44 Fed. Reg. 62,552 (1979).

Following public comments and input from cooperating agencies, NOAA revised the original regulations and repropoed them on June 30, 1980. 45 Fed. Reg. 33,530 (1980). As a result of additional public comments on these regulations, further action on the site was suspended in late 1980 and a final environmental impact statement was never prepared. Then, on April 26, 1982, NOAA announced its decision to remove the site from the List of Active Candidates and to withdraw the draft environmental impact statement. One of the major reasons for the withdrawal from the List of Active Candidates was the fact that a Coral Fishery Management Plan (FMP) for the Gulf of Mexico was about to be implemented. It was felt that this fishery management plan would regulate vessel anchoring on the Banks, the one remaining unresolved issue identified in the DEIS and through public comments. However, when the final FMP was approved, the proposed regulations for implementing it did not include a "no anchoring" provision for vessels on the Banks. 48 Fed. Reg. 39,255 (1983).

On August 4, 1983, Flower Garden Banks was again placed on the site evaluation list (SEL), the first procedural evaluation step prior to being reconsidered for designation as a national marine sanctuary. 48 Fed. Reg. 35,568 (1983). NOAA then published a notice initiating preliminary consultations on May 4, 1984, and sent press releases to relevant media at that time. Forty-one

comments were received with all commenters except one supporting the listing of Flower Garden Banks as an active candidate and with proceeding on the site evaluation. Such listing occurred on August 2, 1984. 49 Fed. Reg. 30,988 (1984).

### Current Status

Comments on selection of the Flower Garden Banks as a marine sanctuary site candidate were received from sources such as federal and state agencies, the oil and gas industry, the fisheries industry, and environmental and public interest groups. All comments are on file at the Sanctuary Programs Division in Washington, D.C., and are available for review. No commenters actually opposed listing the Banks as an Active Candidate, although Exxon stated that it was probably unnecessary and at best premature.

Some of the factors significant in determining placement on the Active Candidate List include the immediacy of the need for protection, the benefits to be derived from sanctuary designation and the feasibility of such designation. Immediacy of need for protection of the Flower Garden Banks arises from the continued anchor damage caused by large commercial vessels anchoring on the reefs and creating significant destruction of living coral communities. Most information about the damage is available only from the various researchers performing monitoring studies for oil and gas companies in the vicinity of the Banks. Substantial damage to the reefs from large anchors has also been reported by Dr. Thomas Bright of Texas A & M University. The continued cumulative effect of such activities to resources is likely to be significant. One aspect of the environmental impact statement and management plan is to document such occurrences and the extent of damage.

A major incentive for reapplication for national marine sanctuary designation is the fact that other federal regulatory authorities apparently cannot protect the Banks from this type of anchor damage. The existing Minerals Management Service stipulations establishing a "no anchoring zone" are not applicable to vessels not engaged in actual oil and gas activities. The prohibition of reef anchoring by vessels over 100 feet in length was eliminated from the regulations implementing the final Coral Reef Fishery Management Plan for the Gulf of Mexico. The Department of State has stated that it believes the United States has jurisdiction under international law to prohibit anchoring in the area, except for anchoring required by *force majeure*.

The outstanding natural resources in the area that could be subject to substantial damage, the opportunity to continue and expand ongoing research and educational programs, and the potential for increasing the public awareness of the Gulf of Mexico's marine environment are among the benefits that will accrue from designation as a national marine sanctuary. NOAA anticipates that there will be little or no negative economic impact although some vessels may be inconvenienced from the ban on anchoring in the area. The Banks area is small and geographically discrete, which makes sanctuary designation

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## THE ALABAMA ENVIRONMENT: A REPORT, 1982-1985

*The Alabama Environment*, a report written by the Alabama Department of Environmental Management (ADEM), documents the progress that the ADEM has made in meeting its various statutory obligations. According to ADEM director, Joe B. Broadwater, the agency has met with significant success in attaining its main objectives; i.e., providing a better mechanism for protecting and preserving the important air, land and water resources of the state and moving from a fragmented environmental regulatory approach to a more comprehensive environmental management concept or philosophy. Of equal importance, he added, is the goal of providing a better understanding of the complexity of environmental issues in the hope of promoting more informed dialogue relative to the decision-making process.

The report focuses primarily on the different agencies, state and federal, which operate within the various divisions to regulate and improve the

quality of and to set present and future goals beneficial to the environment. The ADEM itself contains four units: Field Operations, Air Division, Land Division, and Water Division. The report surveys the goals and general programs and structure of each division, including permit requirements, regulations, enforcement, and standards of review. Some current problems are discussed, along with plans for future trends and policies.

This publication serves as an informative overview of the Alabama Department of Environmental Management and could be beneficial as an index for locating the different resources and agencies within the program.

Copies of the report are available from the Alabama Department of Environmental Management, 1751 Federal Drive, Montgomery, Alabama 36130; (205) 271-7700.

Martha Murphy

## Marine Sanctuaries: A Case Study

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eminently feasible. Although its distance from the mainland would make periodic surveillance difficult, NOAA believes that the management scheme is not likely to require intensive on-site efforts because of the low intensity human use. Staffing requirements and fiscal commitments are not expected to be major. Interagency cooperation and participation by oil and gas operators in the vicinity are an important aspect of the proposed sanctuary management.

Presently, NOAA intends to prepare a draft environmental impact statement and a draft management plan. A scoping meeting will be held in the affected area prior to such preparations. A public hearing will be held on the draft environmental impact statement and before the final statement and management plan are prepared. If warranted, NOAA will then recommend to the Secretary of Commerce and the President that Flower Garden Banks be designated as a sanctuary. The site-specific management plan to be developed will specify goals and objectives for the Banks. Implementation of the plan will be analyzed in the environmental impact statement. As stated, opportunity for public and government agency input and response is provided throughout the designation process by notice in the *Federal Register* and in the local media.

### Conclusion

Because of the potential damage caused by anchoring, the uniqueness of the location, and the value of the resources at the site, Flower Garden Banks is a likely candidate for marine sanctuary status. The environmental impact statement (EIS) and management plan, scheduled for publication in November, 1985, all announcements concerning sanctuary status will be published in the *Federal Register*. For further information regarding this potential sanctuary site, contact the Office of Coastal Resource Management, 3300 Whitehaven St., NW, Washington, D.C. 20235; (202) 634-4236.

[Much of the information for this article came from the *Federal Register*: see 48 Fed. Reg. 151 (1983); 49 Fed. Reg. 19,094 (1984); 49 Fed. Reg. 30,988 (1984).]

Martha Murphy

## THE DEPARTMENT OF ARCHIVES AND HISTORY: A STATE RESOURCE

Although the title "Department of Archives and History" may conjure up images of endless rows of musty books and files, it is actually a dynamic preservation and information source in Mississippi. The Mississippi Department of Archives and History, located in Jackson, performs a wide range of services in addition to its basic function as a State repository for public and private records. These services are important not only in helping to preserve the state's history, but also in providing crucial data for state agencies, lawyers, and the general public.

The Mississippi Department of Archives and History was established in 1902. Its statutory mandate lists the agency's responsibilities as the "care and custody of official archives, the collecting of materials bearing upon the history of the State . . . the editing of official records and other historical materials, the diffusion of knowledge of reference to the history and resources of this State, and the encouragement of historical work and research . . ." Miss. Code Ann. §§39-5-1 *et seq.* (1972). State, county or other officials are authorized to turn over to the Archives for permanent preservation any official books, records, documents or original papers. The Department's primary function, then, is as a repository for official records including those relating to the state government and the Constitution. However, within its broad statutory framework, the Department stores a surprising array of information other than official records, as well as performs duties outside of its preservationist role. The Archives Department keeps land records for the State, Mississippi genealogical records, daily newspapers published in Mississippi, books published in Mississippi, books published by Mississippi authors, cemetery records, and information on confederate soldiers.

When an historical document comes to the Archives Department, it is first processed by the conservation department, which ensures its continued longevity through modern preservation methods. The Department also edits and writes

summations of historical material—a boon for researchers. Clearly, the Department of Archives and History acts as a storehouse for a wealth of information. Such information is useful to state agencies, researchers, and the general public. Moreover, in its capacity as a fellow state agency, the Department may be asked by the Attorney General's office to supply historical data on a particular legal issue or actual suit. In a personal interview, the Special Projects Director of the Department, Patricia Galloway, noted the usefulness of historical data to the legal profession. She pointed out that historical analytical skills can prove valuable to lawyers in civil law and that they should acquaint themselves with the documentary holdings of the state.

Such historical information can be crucial in the analysis of complex legal problems, especially in cases dealing with land ownership. Ms. Galloway's testimony in the Mississippi-Alabama coastal boundary dispute with the federal government is a dramatic example of the need to go beyond a simple interpretation of maps and charts in a discussion of important boundary issues. In that case, the State of Mississippi drew on Ms. Galloway's expertise in establishing historical evidence of Mississippi's claim to enclaves in the Gulf of Mexico. It was necessary to substantiate early documents with historical evidence that settlers had intended to claim the region for the Mississippi territory. The U.S. Supreme Court ultimately upheld Mississippi and Alabama's historic bay argument.

In order to tap into the resources of the Department of Archives and History, lawyers and state officials can acquaint themselves with the valuable resources and services the Department offers. Further, through proper training in computer systems, they can become more proficient in important research skills. An area which was once the province of scholars and academicians can provide information that can greatly improve the quality of legal research, especially in the area of land records. Finally, lawyers and state officials can

gain valuable insight into the historical foundation of Mississippi's modern legal system.

Tatjana Adams

Cornelia Burr

For Further Information, Contact:

Department of Archives and History  
100 S. State St.  
Jackson, MS 39201  
(601) 359-1424

\*This article is the seventh in a series of articles that are appearing in *Water Log* describing federal, regional, state, and local entities that exercise jurisdiction over coastal resources in Alabama and Mississippi.

## SHIFTING CURRENTS OF OCEAN POLICY

\*Dr. James W. Curlin

(The following article was presented by Dr. Curlin during the Legal Program portion of Sea Grant Week '85 in Newport, R.I. The opinions presented are solely of the author and do not represent the views of the Mississippi-Alabama Sea Grant Consortium or the Sea Grant Legal Program.)

The two decades spanning 1965 to 1985, when United States ocean policy achieved its modern form and substance, is a period of contrasts. Spurred by the excitement of space exploration in the early 1960s, ocean and atmospheric programs benefited from the support of a nation then involved in a love affair with science and technology. Ocean and atmospheric programs continued to flourish as the Nation's resources and energies were turned to conservation and environmental protection in the late 1960s. The late '60s and early '70s were the halcyon days—the days of milk and honey—with the Stratton Commission, the White House Marine Council, formation of the National Oceanic and Atmospheric Administration (1970), and the brace of new ocean laws enacted between 1972 and 1976. The blessings of plenty and the optimism of youth captured the imagination of Americans. It was a period of experimentation and innovation.

Then in the early 1970s, political deceit, a failed presidency, and the Arab oil embargo shocked the Nation's moral conscience and engendered doubts about our political fiber and international prestige. As the decade of the '70s drew to a close, increased energy prices caused inflation to skyrocket, interest rates to climb rapidly, and the international embarrassment of the Iranian hostage crisis combined to cause Americans to lose faith in their government's ability to govern. Within this political climate, we in the ocean community struggled to implement the concepts of environmental protection and resource development that had seemed so neat, tidy, and logical when enacted earlier in the '70s. It was a time of consolidation, implementation, and introspection.

In the 1980s, inflation has been brought under control, but instead the United States is facing a national debt fast approaching two trillion dollars—an increase of one trillion dollars in just five years—and a trade deficit of massive proportions in part resulting from an artificially overvalued dollar. We recently became a debtor nation, now owing more to foreign financiers than to American entrepreneurs.

The federal government has suffered further erosion of credibility as politicians are elected by railing against the very government they seek to lead. Once elected, however, they find themselves suffering from the same crisis of confidence, as our elected institutions—the Congress and the Presidency—seem unable to cope with a changing world economy. Americans continue to be taken hostage by self-styled terrorists, which serves to remind us of how ineffective we have become in protecting our national interests abroad. At the same time, however, Americans remain remarkably optimistic about the future—a tribute to the resiliency and spirit of the Nation. It is against this economic and political background that the current status of ocean policy

must be gauged, and the future course of ocean programs charted.

If the U.S. Government were a private corporation, its board of directors should now be considering filing for Chapter 11 protection under the Bankruptcy Act, if they had not done so already. The burden of the immense national debt ensures that we will not likely see a rekindling of the enthusiasm for large, new federal ocean programs for generations to come. Indeed, fiscal austerity and political forces aimed at reducing the size and presence of the federal government are counter currents to the continuation of the ocean agenda that was set in the decade of the '70s. Yet a quiet revolution has taken place during the past five years. The vacuum created by the phasedown of federal ocean programs is causing renewed vigor in the programs of the coastal states.

Some of the most competent talent in ocean-related disciplines has gravitated to state regulatory and planning agencies in response to the lack of opportunities in the federal sector. As a result, the states are becoming more aggressive in demanding an equal say over resource development and environmental protection in federal waters beyond their three-mile territorial sea. The concept of "federal consistency" with state coastal zone plans should, according to some "states' righters," be applied to the entire 200-mile Exclusive Economic Zone (EEZ). At the same time, the states also are demanding a share of the revenues from the sale of resources from the EEZ as compensation for the burdens they must bear for federal decisions. This, I believe, is the most important legacy that will be left in the wake of the current atmosphere of reduced federal spending, deregulation, and smaller central government. The consequences of decentralization of ocean responsibility may eventually be more significant and pervasive than any previous trends in ocean policy.

There is talk of new systems of ocean governance based on concepts of regional and state control of offshore resources. The Coastal States Organization (CSO), the lobbying group for coastal states' interests, currently is assessing a number of options to increase the role of states in the federal decision process. Some of these alternatives would wrest control from federal agencies and relocate them in regional boards, panels or commissions with federal representation. Other options merely expand the role of the states in what traditionally have been federal decisions. Another alternative would expand state ownership of coastal resources from three miles to 12 miles offshore. In any event, it is the self-proclaimed intention of CSO to make the coastal states into ocean states.

These times are reminiscent of the period just prior to the enactment of the Submerged Lands Act of 1953 which gave the states title to the three-mile territorial sea. With the coastal state's claim to ownership of ocean resources rejected by a 1947 U.S. Supreme Court decision in *U.S. v. California* (332 U.S. 19), the states turned to a political remedy. After six years of hard politicking, the states were granted ownership of the lucrative petroleum, minerals, and fisheries resources out to three nautical miles. Similarly, in 1972 the

Coastal Zone Management Act granted the states administrative authority to participate in federal offshore decisions. The 1976 Fishery Conservation and Management Act (Magnuson Act) brought a regional focus to fisheries management through state involvement in the decision process. The states acquired additional leverage over offshore leasing decisions by the 1978 amendments to the Outer Continental Shelf Lands Act.

By now seeking to increase their influence over resource decisions in the EEZ while also claiming a share of the proceeds, the states seem to be back on the course they set nearly 40 years ago when they asserted their claim to offshore resources before the Supreme Court. This time they are better prepared intellectually and financially; but more importantly, the anti-Washington sentiment at large in the land, combined with the federal budget crisis, suggest that the time may be right for a back-to-the-states movement.

Proponents of an enhanced state role see it as a mechanism for resolving conflict—a return to state venue where those directly involved and affected by offshore decisions can make informed judgments. Opponents of additional state involvement believe that the parochial and self-serving interests of the states could impede the use of ocean resources which belong to all Americans, not just those fortunate enough to live on the seashore. Inland states see the coastal states' quest for revenues from federal offshore resources as unjustified greed; coastal states consider their claims as just compensation for burdens they bear from related onshore activities; industry cynics see revenue sharing as a buyoff that will lure coastal states into accepting offshore leasing in return for prospects of higher revenues.

What might be the consequences of a reduced federal role and an expanded state role in ocean resource management? Those national politicians and business interests that espouse a lesser federal role for the sake of deregulation may be surprised at the outcome. Unless crafted carefully and administered with restraint, a regulatory system based on state powers *could* lead to more regulation, not less. In addition, the potential for inconsistencies among state management regimes and among regional systems would be great, and ocean users could be confronted with a regulatory morass. By relinquishing its leadership, the federal government might eventually find itself in the same boat as Canada, where provincial governments have the power of determination over natural resources, and Ottawa behaves more as audience than actor.

Those supporting a stronger state role in offshore resource management dismiss the possibility of regulatory chaos as unlikely. If properly crafted, they argue, sufficient checks and balances among state, federal and private sector interests would ensure balanced administration of regional regimes. On the other hand, few consider our sole venture into regional ocean resource management—the Regional Fishery Management Councils—to be successful enough to serve as a model for the management of other offshore resources.

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## EXXON v. FISHER (D.C. Calif. 1985)

This case arose from Exxon's proposal to drill exploratory wells in the Santa Barbara Channel seven miles off California's coast. The California Coastal Commission objected to Exxon's development plan stating that it failed to comply with the state's requirements to protect marine resources and commercial fishing within the coastal zone. The Commission felt that drilling would interfere with the harvest of thresher sharks by locally-based fishermen. Drift gillnetting, the technique used to catch the sharks, allows fishermen to drift with the current, pulling nets as long as 6,000 ft. in length. The ships are not under power while fishing, and therefore are not maneuverable. As a result, the Commission asserted, they are vulnerable to obstructions such as drilling rigs and their anchoring system. Because the thresher shark harvesting season is limited to a period from May to December (being prohibited during other months because of endangering whale migration), the Commission agreed that the proposed plan would be acceptable if Exxon limited drilling to a period running from Thanksgiving through April 30. Exxon refused because the drilling vessel *Glomar Pacific* is available only in early October; therefore, the Commission's suggestion was economically unfeasible for Exxon.

The Commission concluded further that the exploration would adversely affect the shore-based industries dependent upon commercial fishing. As support for its concern, the Commission cited the fact that other thresher shark fisheries had been closed due to exploratory drilling. On appeal by Exxon, the Secretary of Commerce upheld the California Coastal Commission's decision on two grounds. First, he found the Commission's "drilling window" reasonable when balanced with competing interests. Second, he found that the proposed drilling was not essential to national security.

While awaiting the result of its appeal to the Secretary, Exxon filed suit in federal district court to enjoin the Coastal Commission from restricting drilling operations based solely upon the protection of economic interests of local industries. The state of California argued that Exxon had not exhausted its administrative remedies and that the court should abstain until state law issues were resolved. Furthermore, the state asserted that the Secretary's decision collaterally prevents Exxon from relitigating the construction of the CZMA in a federal district court. Finally, it argued that an injunction was inappropriate until Exxon was prepared to drill its well.

Ruling in favor of Exxon, a federal district judge for the Central District of California held that the Coastal Commission acted beyond its authority when it objected to activities affecting the harvesting of marine resources located outside the state's coastal zone. Judge Rymer found that neither the Coastal Zone Management Act's statutory language and purpose nor its legislative history lent support to the state's position. Section 307 (c) (3) (B) of CZMA requires an applicant to certify that any exploration or development affecting "land use" or "water use" in the coastal zone will comply with a state's coastal management program and will be carried out in a manner consistent with the program. She concluded that, by definition, such land and water uses must occur within the coastal zone.

Although she admitted that there were "difficult questions about the propriety of judicial review" of the Secretary's decision, Judge Rymer nonetheless found that the Secretary's decision did not represent an adjudication of the legal issues before

the court. She stated that congressional policy limits the state's jurisdiction and management of natural resources to those actually located within the coastal zone. The resource in question in the case, the thresher shark fishery, is located outside the coastal zone. Allowing the Coastal Commission to extend its control beyond state territorial limits would expand its authority into waters that are the "exclusive province of the federal government."

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is borrowed from the Interlocal Governmental Agreement Act, which authorizes local governments to agree to act together on certain matters. Any combination is allowed and there is no limit on the number of entities that can get together. Because this Act was not judged sufficient in detail, especially in taxation and other financial matters, for the activities of a water management district, this new type of district has been authorized. The basic functions, powers and duties differ very little from other types of districts. In fact, most of the provisions of House Bill 149 were taken from existing law on master and county water management districts.

There are some key differences, however, primarily in the election of the board of commissioners and the power to adopt rules and regulations which do not conflict with state law and regulations. The statute provides for a minimum of five commissioners, with at least one from each county in the district. As a result, there could be a substantial number of commissioners in a multi-county district.

Another significant difference is that the district does not have to be approved by the Chancery Court, but is created by adoption of identical resolutions by the local entities. If sufficient

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Will those representing state and local interests be capable of equitably representing national interests as well? As lawyers, we understand the pitfalls of representing one's self before the court. To be too close to the case is to risk personal involvement that clouds one's judgment. You must care, but not care *too much* lest you lose objectivity. So too will the states find it difficult to represent their parochial interests, while invoking the wisdom of Solomon to reach collective decisions of national and international dimensions. I leave it to those of you who are Constitutional scholars to determine whether shared authority among local, state and federal governments passes legal muster.

Proponents of regional governance consider it a logical move toward more orderly conflict resolution. But unless carefully engineered, we could be trading one large adversarial system for multiple scaled-down versions of the same adversarial system. The risk of failure might even be greater under a state-oriented decision system. By focusing on regional interests, both the scope of inquiry and the breadth of public participation may be narrowed.

At Oceans '83, I spoke forcefully against cloning the Stratton Commission in the guise of a national ocean policy commission, which was being considered by the Congress at that time in response to President Reagan's EEZ initiative. Events during the interim have caused me to

She held also that the economic interests of a single industry unrelated to the use of land do not constitute "land use" for purposes of the consistency review procedure because Congress intended that the phrase "land use" be interpreted narrowly to include only the "physical utilization of land within the coastal zone."

Martha Murphy

objections are not filed, the district is created; otherwise, an election is held. If part of the district is in an existing district, the proposed district must petition the existing district to provide the service proposed to be provided by the new district. The existing district has ninety days to affirmatively respond or the new district may be created.

The district may finance its operations by revenue bonds, special assessments for special improvements or by a special two mill tax levy. The latter cannot be expended for capital expenditures. The board can also charge for the district's services.

### Conclusion

The new permit system is the first step in a true management system. Much detail remains to be added by the state water management plan and the regulatory system adopted by the Commission on Natural Resources. With the existing interest in water problems in various areas of the state, one can hope that people will become more aware of the necessity for regulations protecting this valuable resource. Education will be an important factor in the success of the program.

\*Al Sage, a staff attorney with the Mississippi Law Research Institute and occasional contributing writer to the *Water Log*, was responsible for drafting the water law amendments discussed in this article.

change my mind. In view of the constraints on federal action arising from the ballooning national debt, the seemingly popular attitude that "less government is best government," and the difficulty in attracting and keeping outstanding individuals in government service resulting from the loss of public respect for civil servants, I now believe that it is time that a national ocean policy commission be convened to chart a future course based on these current realities.

Prominent among the issues a commission should address is the emerging role of the states as the center of regional ocean management. The question I have raised here—not in criticism of the concept of regional ocean governance, but as legitimate national concerns that must be considered—should be explored fully by the brightest and best minds available.

Reappraisal of United States ocean policy should not, however, be undertaken in the politically charged atmosphere of the upcoming 1988 national elections, or under the pall of a lame duck Presidency. Would it not be more timely and prudent to establish a commission timed with the inauguration of the next President in 1989? Democrat or Republican, the new President and the Congress would then have available apolitical advice and counsel for shaping ocean policy to meet the needs of the Nation as we move toward the 21st Century a short ten years hence.

\*Dr. James W. Curlin, a well-known ocean policy analyst, is Senior Associate with the U.S. Congress' Office of Technology Assessment in Washington, D.C.

## 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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**Editor:**

Casey Jarman

**Associate Editor:**

Martha Murphy

**Typists:**

Linda Spence

Rhonda Robertson

## NOTES

Enclosed in the last issue was a questionnaire designed to assess the quality and usefulness of the *Water Log* to you, the subscriber. If you have not yet completed and returned the survey, please take a few minutes out today to do so. Thank you.

The Mississippi-Alabama Sea Grant College Program recently published a monograph examining the legal issues associated with the potential extension of the territorial sea from 3-12 miles. Written by Richard Littleton, former staff attorney with the Mississippi-Alabama Sea Grant Legal Program, *The Territorial Sea: Prospects For the United States* is now available. Ask for Publication No. MASGP-84-021.

The Mississippi-Alabama Sea Grant Legal Program welcomes the two newest members of our staff. Daniel Conner, who received his law degree from the University of Oregon School of Law and an M.S. in Oceanography from Oregon State University, is a former law student research associate with the Ocean and Coastal Law Center. While there he co-edited a guidebook on federal fisheries management as well as co-authored an article on the law of the Pacific salmon fishery published in the *Kansas Law Review*. Dan will focus his research efforts primarily on fisheries management. Rhonda Robertson, a North Mississippi native, has assumed secretarial duties, including that of typist for the *Water Log*. Congratulations go also to Linda Spence, former secretary for the Legal Program, who has been promoted to senior secretary of the Mississippi Law Research Institute.

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