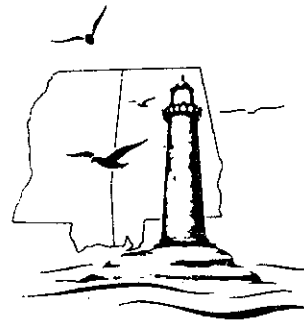


WATER LOG

***A Legal Reporter of the
Mississippi-Alabama Sea Grant Consortium***



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Waterborne Transportation of Hazardous Materials/Wastes

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And More . . .

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WATERBORNE TRANSPORTATION OF HAZARDOUS MATERIALS/WASTES

The production, storage, transportation, and disposal of hazardous materials and wastes have recently come to the forefront of national environmental issues. The federal government is principally responsible for keeping abreast of the proliferation of chemicals into the marketplace and assuring adequate testing and screening to determine their hazards. However, through federally-delegated programs, state governments have assumed important regulatory functions. For example, the Resource Conservation and Recovery Act authorizes state regulation of solid (including hazardous) waste so long as certain federal criteria are met. Local governments also have a role to play, particularly in emergency planning and response. Federal and state officials, for reasons of geography and cost efficiency, rely heavily upon the capabilities of local governments to respond to emergency situations involving spills of hazardous substances. Local governments are often best suited to be first on the scene of a spill incident and to respond to it with experienced emergency response units that operate at constant readiness—i.e., police, fire, and emergency disaster services departments.

This issue of the *Water Log* provides a brief overview of the complex intergovernmental regulatory framework that governs the waterborne transportation of hazardous materials and wastes. Articles are adapted from the *Handbook on The Waterborne Transportation of Hazardous Material and Wastes*, published recently by the Sea Grant Legal Program.

WATER LOG

The *Water Log* is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its purpose is to increase public awareness and understanding of coastal problems and issues.

If you would like to receive future issues of 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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TRANSPORTATION OF HAZARDOUS MATERIALS: FEDERAL LEGISLATION

Introduction

Several major federal laws affect the transportation of hazardous materials. Any carrier of hazardous materials needs to know which Acts will regulate his or her activity, whether waterborne or by land. To understand the federal scheme for regulating the transportation of hazardous materials, it is important to realize that such materials are variously classified according to the purpose and scope of a particular Act of Congress. In each Act, a hazardous material may be restricted to a specific use or subject to broad controls. Depending upon the goals of the legislative directive, standards may be tailored to a specific industrial activity, or they may impose a comprehensive limitation on public exposure to a hazardous substance. Each shipper is generally responsible for keeping up with the status of a chemical and ensuring that it is handled according to regulations.

Terminology has been a source of much confusion. It is necessary to distinguish hazardous "materials" from hazardous "wastes." Hazardous materials include a broad range of substances that are considered hazardous to human health or the environment, or that pose a threat of a chemical nature (such as flammability), thereby creating a risk in handling. Hazardous wastes are a subset of hazardous materials. To further complicate the issue, the terms "hazardous wastes" and "solid wastes" are often used interchangeably, although not all solid wastes are either hazardous or solid. Many liquid wastes are controlled by solid waste legislation.

The regulation of toxic and hazardous substances necessitates close cooperation among federal, state, and local officials. The federal government is primarily responsible for keeping track of the proliferation of chemicals into the marketplace and for assuring adequate testing and screening. Most federal toxic and hazardous materials statutes establish lists of regulated materials.

States may assume regulatory functions through federally approved programs. Local governments usually regulate traffic control and permanent storage of hazardous materials within their jurisdiction, and their expertise in emergency planning and response is respected. Federal legislation, however, places certain restrictions on the exercise of local police powers over the transportation of hazardous materials.

Hazardous Materials Transportation Act

The Department of Transportation (DOT), through its Office of Hazardous Materials Transportation, regulates the movement of 16,000 kinds of hazardous materials under the Hazardous Materials Transportation Act (HMTA). 49 U.S.C.A. §§1801 *et seq.* (West 1976). The Act classifies hazardous materials in nine general categories: 1) explosives, 2) compressed gases, 3) flammable

and combustible liquids, 4) flammable solids, 5) oxidizers and organic peroxides, 6) poisons, 7) radioactive materials, 8) corrosives, and 9) other regulated materials. When transported, hazardous substances and wastes regulated by the Environmental Protection Agency (EPA) under the Clean Water Act and the Resource Conservation and Recovery Act are treated as subgroups under the HMTA. All substances designated under the Comprehensive Environmental Response, Compensation and Liability Act are also on the list of HMTA, but the DOT has been slow to extend its regulatory authority to such materials. Hazardous materials are listed by a frequently revised Hazardous Materials Table. The table contains information on shipping and packaging requirements, proper shipping names, and labeling and carriage requirements. It is important that shippers use the most up-to-date version.

Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) focuses on disposal of both "solid" and hazardous wastes. 42 U.S.C.A. §§6901 *et seq.* (West 1983 & West Supp. 1985). RCRA's hazardous waste management program contains five major elements: (1) federal classification of hazardous wastes; (2) a cradle-to-grave manifest system; (3) federal standards for generators, transporters, and storage treatment facilities; (4) a permitting program for waste facilities; and (5) authorization for state programs to carry out federal directives.

The EPA administers RCRA and is responsible under the Act for identifying and listing hazardous wastes. A waste is classified as "hazardous" if it exhibits one or more of the following characteristics: reactivity, ignitability, corrosivity, or extraction procedure toxicity. The EPA keeps three lists of hazardous wastes: 1) the "F" list—wastes from nonspecific sources; 2) the "K" list—wastes from specific sources; and 3) the "U" and "P" lists consisting of discarded commercial chemical products. The "U" list products are called "toxic" wastes while the "P" products are called "acute hazardous" wastes. The latter are subject to more rigorous control than are other listed hazardous materials.

The term "cradle-to-grave manifest system" applies to a mechanism that tracks the handling of hazardous wastes from generation to final disposal. It creates a "paper trail" to check the movement of a hazardous material and to ensure accountability. The responsibility for determining whether a waste is hazardous is placed on generators of wastes. A waste is hazardous if it has been listed by EPA or has exhibited the characteristics defined in RCRA regulations. A generator of waste must supply the transporter with a Uniform Hazardous Waste Manifest Form. The form, developed by DOT and EPA, covers both RCRA and HMTA requirements. A generator of waste gives copies to each transporter, and keeps one for himself. He must keep track of the manifests and receive a return copy from each facility listed as final

destination for the waste. The generator must investigate a delay in response and notify authorities when it is necessary to trace or account for a hazardous waste.

Transporters also must keep records, including manifest forms. They are authorized to deliver hazardous wastes only to designated facilities that have a RCRA permit. The statute places on transporters a duty to take immediate action to protect human health and the environment in the event of a discharge during shipment, and to report a spill. All transporters must have an identification number obtained from state officials who administer the EPA program.

Toxic Substance Control Act

The Toxic Substance Control Act (TSCA), also administered by EPA, focuses on the regulation of newly produced chemical substances entering the United States market. 15 U.S.C.A. §§2601 *et seq.* (West 1983). Its purpose is to monitor raw industrial chemicals that fall outside the jurisdiction of other environmental laws and regulate them prior to marketing. The Act authorizes EPA to require industries to test for chemical hazards associated with products already on the market, and to require retesting for new uses of substances. By testing for long-term and short-term effects of chemicals before entry into the marketplace, the Act covers a wide range of previously unregulated chemicals. TSCA does not control chemicals already specifically listed by other federal toxic control statutes, but a substance that is a component of a final product already regulated may fall within the purview of the Act. TSCA focuses upon safe handling of raw materials, not finished products or wastes.

TSCA requires EPA to list chemicals that must be evaluated prior to use in the United States. Provisions are made for ranking existing chemicals according to their hazard potential and for subjecting them to toxicity tests when necessary to evaluate their beneficial use against undesirable toxic properties (a risk-benefit analysis).

Chemical manufacture, use, import, or disposal may be banned or controlled under the Act. EPA has authority to inspect transporters and manufacturing and storage facilities. The agency may impose penalties and seize substances produced in violation of the Act.

TSCA mandates an "unreasonable risk" standard to determine the permissibility of manufacturing and distributing toxic substances. EPA considers test data, exposure estimates, and use patterns when deciding whether to prohibit, control, or restrict use of a substance. The probability that a chemical will harm workers, consumers, or natural resources under a planned or current use is part of the risk-benefit analysis. Sometimes even a small quantity of a highly toxic substance may be banned if it is likely to be used outside a closed system.

A potential hazard during manufacture, use, or disposal, either in the United States or other countries, may lead to a ban or control of a chemical

under TSCA. The Secretary of Treasury must certify compliance of imported chemicals before they will be allowed entry. In most cases, certification is based upon the actual knowledge of an importer, who has the duty to make a good faith effort to ensure that the material is in compliance.

Another provision allows citizens or public interest groups to sue in federal court if they believe EPA to be in violation of TSCA, or to force control of a chemical they consider hazardous. Citizens may also petition EPA to issue, amend, or repeal a rule regulating a chemical. Finally, TSCA has an "imminent hazard" provision that gives EPA emergency powers to seize chemical substances that pose an immediate health or environmental threat.

Comprehensive Environmental Response, Compensation and Liability Act

Unlike other federal hazardous materials laws, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) does not regulate hazardous substances. Rather, it provides a system for identification and cleanup of inadequate disposal sites. 42 U.S.C.A. §§9601 *et seq.* (West 1983). CERCLA applies by reference to materials defined in RCRA, the Clean Water Act, and the Clean Air Act, as well as to some of the materials defined in TSCA. It also contains a catch-all provision that allows EPA to designate additional substances as hazardous.

CERCLA requires that persons in charge of vessels or facilities advise the National Response Center of releases of hazardous substances in excess of pre-established minimum "reportable quantities." EPA is authorized to adjust these reportable quantities. Discretionary adjustment of reportable quantities is intended to reduce reporting burdens on the regulated community, to allow EPA to focus its resources on the most serious releases, and to protect public health and the environment more effectively.

Clean Water Act

The Clean Water Act (CWA) regulates the discharge of both toxic and non-toxic pollutants into navigable waters of the United States. 33 U.S.C.A. §§1251 *et seq.* (West 1986). Through the use of water quality standards and a permit system, it regulates industrial activities by controlling discharges of pollutants. The Act envisions that standards set for industrial effluents will be achieved through mandatory guidelines for industries.

Effluent standards for industries are defined in terms of tailored guidelines for the discharge of specific pollutants, while standards for spills are defined in terms of specific reportable quantities. The CWA and CERCLA use the same standards for reportable quantities of hazardous substances.

Under the CWA and CERCLA, EPA and the Coast Guard direct the National Contingency Plan (NCP), developed to facilitate reporting and removal of hazardous materials and oil spills. The Coast Guard operates the National Response Center Telephone Hotline, created under the NCP to

prescribe emergency actions for spills. The Coast Guard has responsibility for investigating spills into the environment and waters of the coastal zone, while inland spills fall under the jurisdiction of EPA. The NCP, originally written to implement the Clean Water Act, has now incorporated CERCLA requirements.

Port and Tanker Safety Act

The Port and Tanker Safety Act, administered by the United States Coast Guard, is designed to protect life, property, and the marine environment, as the nation faces an increase in waterway traffic. 33 U.S.C.A. §§1221-1226 (West 1986). To reduce losses and adequately control operations (especially those involving handling of dangerous substances), the government considers intensified supervision of vessel and port operations to be necessary. The Act concentrates on advance planning to safeguard ports and waterways.

The Coast Guard has authority to establish operating requirements for vessels, traffic safety, and port access routes. The Act also allows the Coast Guard to establish waterfront safety regulations, including regulations for loading, unloading, and storing hazardous materials, and for setting structural standards for waterfront facilities. The Coast Guard is authorized to order a vessel to anchor if the vessel is believed to be in violation of the Act or if hazardous conditions justify such action. The Coast Guard investigates accidents and can impose civil and criminal penalties plus *in rem* liability on a vessel which allows its seizure in order to compel compliance. The Coast Guard can furthermore restrict entry or withhold clearance of a vessel.

Coast Guard authority to monitor shipments and enforce regulations arises from sources other than the Port and Tanker Safety Act, including the United States Shipping Code and HMTA. Under these laws the Coast Guard certifies the shipment of bulk materials, inspects shipments entering and leaving the country, and supervises loading and unloading operations. Where authority overlaps, the Coast Guard enforces both EPA and DOT regulations that may apply in addition to the shipping regulations.

Federal Insecticide, Fungicide and Rodenticide Act

Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) regulations cover more than one billion pounds of pesticides produced and used in this country. 7 U.S.C.A. §§136 *et seq.* (West 1980 & West Supp. 1985). EPA administers the Act, but states are responsible for primary enforcement through EPA authorized programs.

FIFRA regulates chemicals that function as pesticides, regardless of their original purpose at manufacture. Chemical products that regulate plant growth and insect life cycles are also covered. Devices such as animal traps are regulated, but are not subject to the full registration requirements that apply to chemicals. The Act allows EPA to establish safety standards for pesticide

products and to remove them from the market, restrict their use, or refuse registration for products that fail to meet these standards.

EPA joins with the Food and Drug Administration (FDA) to set pesticide tolerance levels in food products. EPA collects safety data on pesticides and sets limits on pesticide levels in raw meat and agricultural products. FDA sets the limits on pesticide levels in processed foods, while the Department of Agriculture sets them for edible portions of meat. The FDA and the Department of Agriculture jointly administer inspection programs for foodstuffs. Production and use of pesticides that create a risk to the environment may be suspended, cancelled, or restricted. The statute provides for civil and criminal penalties.

FIFRA regulations requiring that all pesticides be registered with EPA before shipment, delivery, or sale in the United States have important effects on hazardous material transport. As part of this registration process, EPA evaluates environmental risks of product use. When making an assessment the agency concentrates on the controlled use of a product and its intended application. As a result, risks from improper handling may go undetected. The economic and health-related consequences of improper handling can be serious, and such abuses are difficult to police effectively.

FIFRA is unusual among federal environmental laws in that it requires EPA to balance pesticide risks with economic, social, health, and environmental benefits. If a pesticide use has a considerable economic value but also poses a significant risk to human health, EPA may restrict its use to those crops on which it is most effective. A 1978 amendment provides for public access to health and safety studies submitted by registration applicants.

Federal Shipping Code

The Federal Shipping Code provides requirements for safe shipping of hazardous materials. (The Shipping Code is scattered throughout Title 46 of the United States Code.) It defines "hazardous material" as any liquid material or substance that is flammable or combustible, or that is designated hazardous under the CWA or HMTA. The Code focuses on physical hazards and contains no additional references to health-related criteria.

Summary

Each of the seven Acts discussed above represents an important element in the body of federal hazardous materials control law. The Hazardous Materials Transportation Act (HMTA) gives the Department of Transportation a mandate to design a Hazardous Materials Table that contains requirements for shipping and packaging of regulated substances. The Resource Conservation and Recovery Act (RCRA) is a hazardous waste management program that classifies and tracks wastes, provides standards for generators

and handlers, provides for the issuing of permits, and authorizes state programs to carry out its requirements.

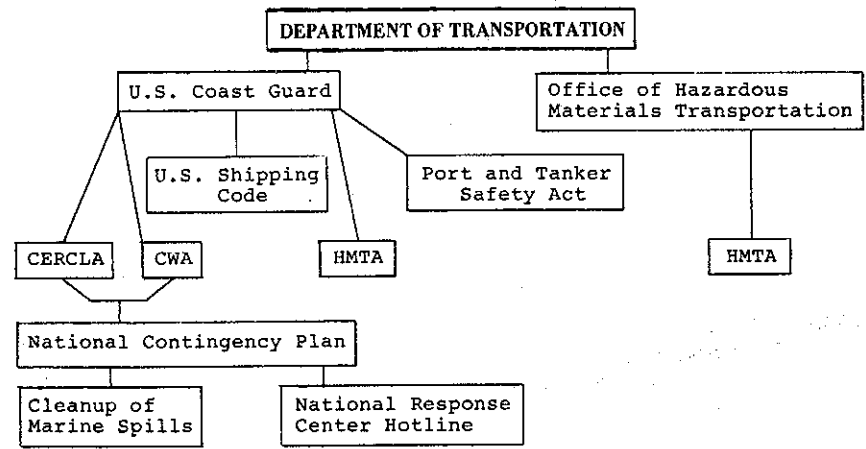
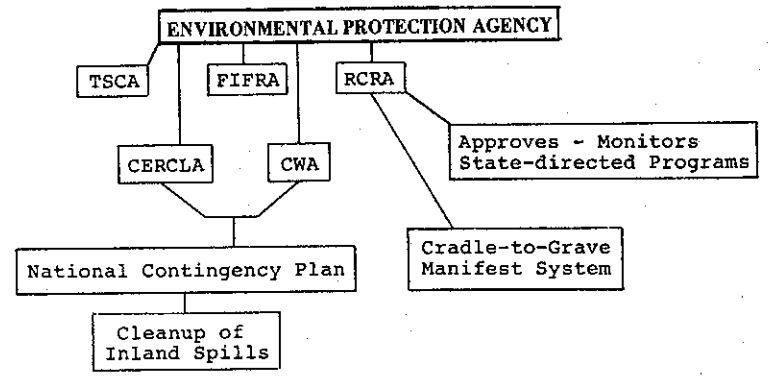
The Toxic Substances Control Act (TSCA) is intended to prevent the manufacture of quantities of chemicals that will impose environmental and social costs in excess of their beneficial value. It gives EPA authority to monitor raw industrial chemicals prior to marketing by requiring pre-production testing by the manufacturer. Under the Clean Water Act (CWA) mandatory effluent standards are intended to prevent discharge of both toxic and non-toxic pollutants into navigable waters. The Act also provides requirements for reporting and cleaning up spills. Further protection of navigable waterways is the purpose of the Port and Tanker Safety Act, which allows the Coast Guard to establish protective measures to safeguard ports and waterways from spills of hazardous substances. The Federal Shipping Code provides requirements for safe shipping of hazardous materials by focusing on their physical hazards as opposed to health-related criteria.

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) requires EPA to develop regulations to control use of chemicals as pesticides. EPA uses a cost-benefit analysis to determine the type of substance control necessary. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is essentially the final step in hazardous material regulation. It provides for identification and cleanup of hazardous material disposal sites through the Superfund program.

The chart below is designed to illustrate more fully the administrative duties of EPA and DOT under the various laws described in this article.

Cornelia Burr
Robert O'Dell

**HAZARDOUS MATERIALS TRANSPORTATION:
KEY FEDERAL AGENCIES AND LAWS CHART***



*More detailed narrative information concerning agency responsibilities is available upon request.

STATE HAZARDOUS MATERIAL TRANSPORT MANAGEMENT AND EMERGENCY RESPONSE: MISSISSIPPI AND ALABAMA

Introduction

The special nature of spills of hazardous materials into waterways requires a high level of expertise and efficiency in emergency response. In this context both speed and technological proficiency are generally demanded, thereby creating a special logistical problem: i.e., the need for centralization of equipment and trained personnel versus a need for rapid on-site action. As a result, a close working relationship among the transportation industry and state and local governments is desirable. This article discusses briefly the roles that Alabama and Mississippi have assumed in hazardous material transport management and emergency response.

Hazardous Material Transport Management

Both Mississippi and Alabama have adopted legislation that authorizes state management of hazardous materials transportation within their boundaries. Mississippi enacted its Solid Waste Disposal Law in 1974. Miss. Code Ann. §§17-17-1 *et seq.* (Supp. 1985). Alabama's Hazardous Waste Management Act was passed in 1978. Ala. Code §§22-30-1 *et seq.* (1984 & Supp. 1985). The respective state agencies with responsibility for implementation of these legislative mandates are the Mississippi Department of Natural Resources (DNR) and the Alabama Department of Environmental Management (ADEM).

Mississippi's DNR and Alabama's ADEM have each received authorization from the Environmental Protection Agency to operate state programs in compliance with federal Resource Conservation and Recovery Act (RCRA) standards. Shipments of hazardous materials within either state must be accompanied by the Federal Uniform Hazardous Waste Manifest required by RCRA. (See article "Transportation of Hazardous Materials: Federal Legislation" elsewhere in this issue for a discussion of RCRA.)

Mississippi and Alabama have adopted the federal requirements for recordkeeping, labeling, and vehicle placarding. Both states carry out the task of obtaining RCRA transporter identification numbers for permit applicants within their jurisdiction. In Alabama state permits are issued by the Land Division of ADEM which requires the permit applicant to submit a spill contingency plan and proof of insurance. Mississippi requires only that transporters meet RCRA and Hazardous Materials Transportation Act standards.

Emergency Response

A transporter must report a spill of hazardous substances within Alabama to both the Coast Guard National Response Center and ADEM's Water Division. Coordinated efforts, supervised by ADEM, are then taken to contain or remove the spilled material.

Mississippi's Natural Disaster Plan, implemented by the Mississippi Emergency Management Agency (MEMA), provides guidelines for state emergency response to hazardous material spills. The Plan envisions that emergency operations be conducted by the lowest level of government affected. Local governments, with the assistance of MEMA, develop their own emergency response plans and maintain emergency disaster response staffs. Municipal and county governments are authorized to use available resources, both public and private, when reacting to an emergency situation. However, local governments often have limited capabilities to respond effectively to such an exigency. Therefore, the Mississippi Bureau of Pollution Control, with more resources at its disposal, is responsible for overseeing spill operations. It maintains an Emergency Response Contingency Plan which incorporates by reference the *Hazardous Materials* section of the Natural Disaster Plan. The Bureau of Pollution Control also handles oil spills under its Emergency Response Contingency Plan.

Conclusion

The Alabama Department of Environmental Management publishes a periodically updated manual containing the pertinent regulations for hazardous materials transporters. Similar information for Mississippi is available from the Department of Natural Resources. For more detailed information regarding the states' regulations and contingency plans, the following should be contacted.

Alabama: Alabama Department of Environmental Management
Land Division
Hazardous Waste Branch
1751 Federal Drive
Montgomery, AL 36130

Mississippi: Department of Natural Resources
Division of Solid Waste Management
Bureau of Pollution Control
P.O. Box 10385
Jackson, MS 39209

GOOD SAMARITAN STATUTES: PROTECTION OR FALSE SENSE OF SECURITY?

Good Samaritan legislation, originally designed to protect emergency medical personnel from civil liability, has become prevalent among the states in the past few years. Designed to insulate certain classes of persons who render emergency aid from hindsight scrutiny of their actions, such laws help to eliminate strong disincentives to voluntary aid that might otherwise exist. The classes of persons protected by Good Samaritan statutes vary from narrow (e.g., applicable to medical personnel only) to any person acting in good faith.

As of 1984, twenty-four states have adopted legislation providing immunity from liability for experts who respond to hazardous material accidents, so long as gross negligence is not involved. Abbot, *et al.*, *Hazardous Materials Transportation—A Legislators Guide*, National Conference of State Legislatures (1984). Alabama's statute, which does not specifically address incidents involving hazardous materials, is of the narrow "medical personnel and rescue squad" type, applicable only to specific personnel who render aid at the scene of an accident. Alabama Code §6-5-332 (Supp. 1985). Alabama law protects such persons from liability if they act gratuitously and in good faith. Thus the statute would seem to provide protection for both simple and grossly negligent behavior.

Mississippi, on the other hand, has three separate Good Samaritan statutes involving: (1) emergency medical care [Miss. Code Ann. §73-25-37 (Supp. 15 1985)]; (2) accidents involving spills of hazardous materials [Miss. Code Ann. §17-17-57 (Supp. 1985)]; and (3) liability of an operator of a vessel involved in a boating accident [Miss. Code Ann. §59-21-55 (Supp. 13 1985)]. These statutes are atypical. The differences among them go to the very heart of the purpose of Good Samaritan legislation: i.e., the standard of care for which the protected actor remains liable despite the protection offered by the statute.

As a rule, Good Samaritan legislation in the context of hazardous materials emergency response relieves the actor from liability for simple negligence but not for gross negligence. (Abbot, 1984). In other words, immunity extends to actions or omissions that do not meet the standard of a reasonable and prudent person (or doctor, or chemicals expert, as the case may be) in the actor's situation. Protection is never afforded for reckless disregard of a legal duty. The three Mississippi Good Samaritan statutes, however, require that in order to receive immunity from liability the actor must have acted "in good faith and in the exercise of reasonable care." This language presents a grave and self-contradictory situation wherein the standard of conduct required is arguably the very same conduct that such statutes are intended to protect. As a result, the threshold requirement to receive protection of the statutes nullifies the immunity ostensibly provided.

The above conclusion is based on the substantial equivalence of the generally accepted "negligence" standard—what a reasonable and prudent person would do in same or similar circumstances—to the "in the exercise of reasonable care" statutory language.

To date, there are no reported court cases interpreting any of Mississippi's Good Samaritan laws. Conceivably, the courts could interpret "in the exercise of reasonable care" to mean something distinct from an actor's absence of negligence. Such a decision could be based upon the apparent intent of the legislature to effectuate the common objectives of "Good Samaritan" legislation. But such a conclusion might be tenuous, especially in light of the further requirement, found in the vessel operators' liability statute, that the protected actor must have acted "as an ordinary, reasonable, prudent man would have acted under the same or similar circumstances."

In conclusion, Mississippi is left with a trio of "Good Samaritan" statutes which are quite likely of no use. At first glance, §17-17-57 would appear to offer some protection to those who respond to hazardous chemical spills if their negligence proved to be a cause of further damages. Section 59-21-55 also appears to provide immunity to a vessel owner who tries to mitigate the effects of a spill of hazardous materials from his own or another vessel. However, in light of the shortcomings of either statute as discussed above, reliance upon exculpatory provisions of either one might be ill-advised. Alabama's single Good Samaritan statute, although providing extensive immunity to certain classes of persons (doctors, emergency medical technicians, police, firemen, etc.) in certain contexts (medical and mine emergencies) offers no protection to either a shipper or bystander who may negligently have caused further injury despite good faith efforts to render aid.

In short, Mississippi and Alabama laws send a clear message to prospective "Good Samaritans": Beware—your efforts to help at the scene of a hazardous material spill or other emergency could be rewarded with a lawsuit.

Robert O'Dell

FEDERAL FISHERIES MANAGEMENT: A GUIDE BOOK TO THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT

Edited by

Jon Jacobson, Daniel Conner and Robert Tozer

As its name implies, this book provides a guide to the complexities of the Magnuson Act. Given its practical orientation, it will be of maximum use to the commercial fisherman and to the non-specialist lawyer. The comprehensiveness of the guidebook can be seen from a table of contents that runs from such useful background topics as the evolution of extended fisheries zones, the passage of the Magnuson Act, and an overview of the exclusive economic zone, to the more technical issues of how fishery management plans (FMPs) are developed, civil and criminal penalties for violating the Act's provisions, and the warrantless search provision.

The main body of the work addresses in a very solid fashion the mechanics of the present system of fisheries management that was created by the Magnuson Act. The way in which foreign fishing is handled is spelled out in considerable detail and in a way that those not conversant with these matters on a day-to-day basis will appreciate. Similarly, the role of the regional councils and their structure and operations are described clearly and completely, although a bias toward the workings of the Pacific Council has obviously crept in. The workbook also covers the process by which fisheries management plans are prepared in a manner that should be of considerable use to newcomers to this somewhat involved procedure. It concludes with an extensive treatment of the complexities of the enforcement process, especially its legal underpinnings.

This 1985 revised edition updates an earlier (1982) version, incorporating new discussions of the 1983 amendments to the Magnuson Act and regulations in effect until mid-1984, and a new section addressing the relationship of the fishery law with the Coastal Zone Management Act (CZMA) and addressing the implications of the recent (January 1984) Supreme Court decision on the role of the states in offshore oil development. The revised edition, too, incorporates a new 'pan-Pacific' emphasis, with discussion of the management of U.S. fisheries in the western Pacific. Anticipating that the rapid pace of change in U.S. fisheries law will continue (particularly in view of the pending 1985 reauthorization of the Act), the authors have presented this revised edition in a loose-leaf format to "permit convenient and inexpensive updating of Guidebook material."

The book fills what had been a large void in the literature on U.S. fisheries management. In it, we now have a clearly written, well documented source of information on the Magnuson Act and its functioning, at least in the Pacific north-west. The workbook is a place to go for description and information but not for analysis (a book that analyses the Magnuson Act with insight,

and draws lessons from what is working and what is not, remains to be written). As implied above, the book suffers somewhat from a Pacific north-west orientation. Observers familiar with the operation of the Magnuson Act elsewhere will know that very significant differences exist in the way in which it is being implemented in various regions of the country and that these differences are fundamental when it comes to an evaluation of the overall efficacy of the Act.

As would be expected of a book authored by law school researchers, the treatment of the legal aspects of the Magnuson Act is well handled. Given the relatively large volume of case law that has developed in the short time since passage, it is essential that those wanting to understand the workings of the programme be conversant with this aspect as well.

It is hoped that the promise for future editions and updates is kept. Certainly, the rate of change in this field merits that kind of attention. It is also hoped that the authors take the time to extend their excellent beginning. The experience of other regional councils could very usefully be incorporated into future updates. Discussion of fishery management relations with our neighbors, Canada and Mexico, might also be usefully included in future revisions, especially with regard to transboundary fisheries of interest to U.S. fishermen.

Biliana Cicin-Sain

Copies of the *Guidebook* (Publication No. ORESU-H-85-001) are available from Ocean and Coastal Law Center, University of Oregon Law School, Eugene, Oregon 97403 for a price of \$5.00.

(This book review has been reprinted with permission from the October 1985 edition of *Marine Policy*).

ALABAMA SEA GRANT ADVISORY SERVICE: YOUR SEA GRANT CONNECTION

***William Hosking**

Coastal problems and concerns are usually part of an extremely complex set of interrelated issues. Decisions relating to a broad scope of issues encompassing economic, sociological, legal, environmental, resource utilization, waste disposal, and aesthetic questions must be made. Although the same observation can be made about issues in the interior portion of the state, the fragile nature of the beaches, marshes, and estuaries of the coastal region and the complex interaction of coastal systems pose even more serious consequences from inappropriate actions.

Sea Grant, a nationwide federal/state program of research, education, and advisory service, seeks to insure the wise use and development of these coastal ecosystems. The Mississippi/Alabama Sea Grant Consortium provides direction, guidance, and administration for the Sea Grant Program in the states of Mississippi and Alabama. Four Alabama universities have joined with five Mississippi institutions to form this unique and effective two-state Consortium. The Alabama members are Auburn University, the University of Alabama, the University of Alabama in Birmingham, and the University of South Alabama. Mississippi institutions include the University of Mississippi, Mississippi State University, the University of Southern Mississippi, Jackson State University, and the Gulf Coast Research Laboratory. Faculty members at these institutions address coastal problems and opportunities by conducting research and formal education programs.

The Sea Grant Advisory Service Program has the responsibility of providing the link between these academic institutions and the public. Each state has an Advisory Service program devoted to the needs of its citizens. In Alabama, the Sea Grant Advisory Service is part of the statewide Alabama Cooperative Extension Service of Auburn University. As part of the Extension Service team, Advisory Specialists can obtain technical and resource support from all parts of Alabama, thus increasing the benefits from every dollar spent on the program.

Working within the three major Sea Grant themes—Coastal Resource Development, Food from the Sea, and Coastal Recreation—the main task of the Advisory Service is the two-way transfer of information. In response to your needs, questions, and problems, Advisory Specialists provide informal, practical, and reliable marine-related information through meetings, workshops, demonstrations, newsletters, radio, television, newspapers, publications, and personal visits. The information provided is the result of university research conducted by the Consortium members, Sea Grant Programs of other coastal states, and even from other parts of the world. If you live, work, or vacation in the Alabama coastal area, there's a good possibility that at least one of the Advisory Service's many projects has either directly or indirectly influenced your life.

Do you enjoy having fresh, high-quality seafood available in your favorite restaurant or retail store? When Hurricane Frederick destroyed the Dauphin Island Bridge, shrimpers were unable to use a previously productive area because of damage to their nets from the debris. Advisory Service staff participated in sonar and underwater diving surveys to determine the locations of much of this debris and published information that allows shrimp vessels to avoid these underwater obstructions. This project returned highly-productive waters to shrimping use. Ongoing projects with the commercial seafood industry include: Seafood Quality Improvement, Soft-shell Crab Facility Assistance, and a Trawl Efficiency Device (TED) demonstration project. The TED project involves a modification to shrimp nets that helps reduce the finfish by-catch while trawling.

Are you a recreational boater or saltwater fisherman? If so, you would probably be interested in the Advisory Service publications on marinas and launch sites, tide tables, artificial reefs, and construction of trawl doors for recreational shrimping. Or you might have attended the Advisory Service workshops on recreational shrimping, recreational fishing, or responded to the marina owner survey.

Is a visit to the beach your idea of a perfect day? If you own beachfront property, you probably have a copy of our brochure on rebuilding damaged beaches and dunes. You might also be interested in our publications that discuss biology and management practices for oysters, crabs, and fish. The Advisory Service also provides assistance to private firms in the coastal recreation and charter boat industries.

Is a concern for the environment one of your high priorities? Do you want to see economic growth and more jobs for Alabama's coastal area? Do you favor the concept of a balance between economic growth and conservation of the environment? The Alabama Sea Grant Advisory Service works toward maintaining this balance as a part of Sea Grant goals. Sponsorship and co-sponsorship of conferences, seminars, and meetings on the Mobile Bay estuary, Mobile Bay problem identification workshops, and public comment on issues and goals of the coastal area are a few of the projects in which we have participated.

The Alabama Advisory Service office is located in Mobile and works directly in the state's two coastal counties, Baldwin and Mobile. Four full-time Advisory Specialists trained in marine economics, fisheries management, seafood technology, and marine biology provide an information base for marine and coastal concerns. They work closely with faculty at Consortium universities, Sea Grant Programs in other states, and many federal, state, and local government agencies.

Many Advisory Service activities are conducted in cooperation with existing groups, agencies, and organizations at the local, state, and federal level. Advisory Specialists use the resources available from other sources whenever needed to provide the best information at the lowest cost. Often participants from other organizations or agencies have a major role in Advisory

Service workshops, seminars, or meetings. Our goal is to bring information to the people who want and need it, from the best available source. If accurate and unbiased information on a topic of interest to coastal residents is not available from any source, then our job is to help initiate research at Consortium institutions. To complete the cycle, the Advisory Service then delivers the research results to those people who need the information.

Now that you know more about the Sea Grant Advisory Service Program in Alabama, let us know about YOU—your ideas, your problems, and your needs. All members of the Advisory Service staff have the goal of providing the best available information and assistance to the residents of the state of Alabama. If you need further assistance or information, contact:

Alabama Sea Grant Advisory Service
3940 Government Boulevard
Mobile, Alabama 36609
Telephone: 205/661-5004

*William Hosking is Director of the Alabama Sea Grant Advisory Service. This article is the eighth in a series of articles that are appearing in *Water Log* describing federal, regional, state, and local entities concerned with the management of coastal resources in Alabama and Mississippi.

TALLENTIRE v. OFFSHORE LOGISTICS, INC. 754 F.2d 1274 (5th Cir. 1985)

Introduction

The Fifth Circuit Court of Appeals recently upheld the right of Louisiana citizens to recover under the state's wrongful death statute, even though the death occurred outside the territorial waters of Louisiana. The court also held that recovery for nonpecuniary losses under the state statute was not preempted by the federal Death on the High Seas Act (DOHSA).

The case arose when two Louisiana offshore workers were killed in a helicopter crash 30 miles off the Louisiana coast. Air Logistics, Inc., a Louisiana corporation, owned and operated the helicopter. The plaintiffs asserted that Louisiana's wrongful death statute applied outside territorial waters either under its own force or as adopted federal law under §1333 of the Outer Continental Shelf Lands Act (OSCLA).

Background

On land, damages for wrongful death frequently include both "pecuniary" losses (such as funeral expenses and loss of future earnings) and "nonpecuniary" losses (such as pain and suffering and loss of companionship), depending on applicable state law. In maritime cases, however, admiralty law controls, and recovery for such losses depends on the occupational status of the decedent (i.e., was he classified as a "seaman"), whether he or she died within state territorial limits, and the cause of death. Longshoremen and harborworkers are covered under the federal Longshoremen and Harbor Workers Compensation Act; seamen under the Jones Act, Death on the High Seas Act (DOHSA) and a common law remedy established by the United States Supreme Court and enforced by admiralty courts. All other persons are covered under DOHSA and general admiralty law.

Although federal admiralty law originally provided no recovery for wrongful death, admiralty courts historically have applied available state wrongful death statutes. *The Hamilton*, 207 U.S. 398 (1907). In 1920 Congress passed both the Death on the High Seas Act and the Jones Act to provide a uniform remedy in maritime wrongful death cases. The Jones Act applies to all "seamen" whose deaths occur either within or outside state territorial waters, while DOHSA covers all citizens killed outside the three mile territorial limit only. Both acts limit recovery in wrongful death suits to pecuniary losses. Passage of these remedies left Congressional intent unclear, however. Were state wrongful death acts still available to plaintiffs in admiralty court? This question was partially answered in 1964 when the Supreme Court held that the Jones Act was a seaman's exclusive remedy for negligence. *Gillespie v. U.S. Steel Corp.*, 379 U.S. 588 (1964).

In 1970, the Supreme Court established a common law wrongful death remedy in admiralty. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). Four years later, the Court expanded the scope of the remedy, holding that damages in admiralty wrongful death actions may include nonpecuniary as well as pecuniary damages. *Sealand Service v. Gaudet*, 414 U.S. 513 (1974).

Within this framework the Fifth Circuit of Appeals took up the question of state remedies. In *S/S Helena*, the court held that the establishment of a common law remedy in *Moragne* negated any reason to apply state wrongful death remedies in admiralty courts when death occurs within a state's territorial waters. *S/S Helena*, 529 F. 2d 744 (5th Cir. 1976). Since the Supreme Court subsequently refused to hear an appeal in this case, the question of state remedies in territorial waters must be viewed as settled for now. But in 1978 a more conservative Supreme Court spoke again on wrongful death remedies, confusing further their scope and applicability. The Court held that the pecuniary damages recoverable in a DOHSA action could not be supplemented by nonpecuniary damages available under the general admiralty law. *Mobil Oil Corporation v. Higginbotham*, 430 U.S. 618 (1978). In other words, compensation for loss of companionship, pain and suffering, and the like, could be granted only in cases where death occurred in state territorial waters and no coverage exists under the Jones Act.

One result of this confusion is that when a non-seaman suffers wrongful death in state territorial waters, his or her survivors may sue under *Moragne* and recover both pecuniary and nonpecuniary damages. But survivors of seamen, in the same circumstances, may recover nonpecuniary damages only in a suit for breach of warranty of seaworthiness under the general admiralty remedy established by *Moragne*. On the high seas, however, DOHSA limits damages recoverable to pecuniary for non-seamen and seamen alike. This limitation applies also to suits for unseaworthy condition.

The question addressed in *Tallentire* is whether "landlubbers" can recover under both a state wrongful death remedy and DOHSA. In the following discussion it is helpful to remember that, unless directly modified by Congressional legislation, general admiralty law controls. Thus courts will hold invalid state law that conflicts with federal law.

Preemption

One of the major issues of *Tallentire* is whether DOHSA preempts state statutes. If so, nonpecuniary claims would be disallowed. Resolution of this issue turned on interpretation of §7 of DOHSA (the Mann Amendment), which states in part that "[t]he provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." As originally drafted, however, the section limited state statutes to "causes of action accruing within the territorial limits of any state. . . ." Courts interpreting the Mann Amendment have issued conflicting opinions over the significance of this change in language. Resort to legislative history has

provided no clear guidance. The Fifth Circuit, relying on well settled federalism principles, held that "absent a clearly expressed legislative intention, the plain words of the statute must ordinarily be regarded as controlling." The court interpreted the section as written: i.e., state law is not preempted. Therefore, Louisiana's wrongful death statute is not affected by the limitations of DOHSA.

Legislative Jurisdiction

The next major issue the court addressed is the extent of Louisiana's authority to enact laws governing death on the high seas. In *Tallentire*, the Fifth Circuit followed the theory that "the law follows the flag," first enunciated in *The Hamilton* and affirmed in *Skiriotes v. Florida*, 313 U.S. 69 (1941). In the earlier case the Supreme Court held that when Congress is silent on the matter and no bar exists to a state's application of its own statutes to its own citizens, vessels owned by a citizen of a state are part of the territory of that state. In *Skiriotes* the court went further, holding that a state may govern the conduct of its own citizens on the high seas when the state has a legitimate interest and there is no conflict with federal law.

Following the above cases, the Fifth Circuit in *Tallentire* ruled that "given a sufficient interest in a wrongful death outside its territorial waters . . . [and] absent conflicting federal law . . . a state may also constitutionally apply its own law to order the rights of its citizens with regard to that death." State citizenship of the victims together with a compelling state interest in compensating survivors was apparently sufficient for Louisiana law to apply.

Conflict

Tallentire perpetuates a conflict among the circuits on whether DOHSA preempts state wrongful death statutes on the high seas. The leading case on the opposing side is a Ninth Circuit opinion holding that DOHSA preempts state law because of the need for uniformity in admiralty wrongful death actions. The Ninth Circuit reasoned: "If the federal remedial scheme for death within state territorial waters takes precedence over state remedies, then certainly the federal scheme for death on the high seas, where primacy of federal interests are clearer, should also take precedence." *Nygaard v. Peter Pan Seafoods*, 701 F. 2d 77, 80 (9th Cir. 1980) The holding adds that if federal law should control in state territorial waters but not on the high seas, the resulting illogical situation would damage the uniformity of admiralty law.

The Fifth Circuit agreed with the Ninth about the lack of logic and uniformity, but noted that the Mann Amendment had not been considered in the Ninth Circuit opinion. The Fifth Circuit stated that the problems with logic and uniformity were inherent in DOHSA itself and that it was not up to the courts to correct those problems. Congress could change the statute if it so desired.

Conclusion

As a result of *Tallentire*, survivors of non-seamen decedents may recover for nonpecuniary losses either within state territorial waters or on the high seas by manipulation of state and federal causes of action. On the other hand, survivors of seamen—long referred to "as wards of the admiralty court"—will be in the exasperating position of recovering nonpecuniary damages in territorial waters by joining both federal claims, but limited to pecuniary damages when death occurred on the high seas, regardless of the type of federal claim.

The current law is untenable and needlessly complex. The United States Supreme Court has agreed to review *Tallentire* and may resolve the situation within the coming year. Two issues will be presented on appeal: (1) will state wrongful death statutes be given independent force and effect on the high seas, and (2) if not, may admiralty courts utilize state law remedies as a supplement to DOHSA?

What will happen when these issues reach the Supreme Court will be of interest. The high Court will be faced with three alternatives. First, it can affirm *Tallentire* and the Fifth Circuit's interpretation of the Mann Amendment. Second, it can overrule the case, thereby sanctioning interpretation of the Mann Amendment as it originally was written. Third, it can overrule its decision in *Mobile Oil* and allow DOHSA to be supplemented by nonpecuniary damages under admiralty common law principles. Under any of these approaches, problems of interpretation will remain. The first alternative will leave a crazy-quilt pattern of nonuniformity in admiralty jurisdictional law. The second will leave a similar pattern to admiralty remedies for wrongful death. The third possibility might cure the problem of uniform remedies, but may not necessarily solve the jurisdictional problems, unless the Court specifically holds that in the interest of uniformity state remedies for wrongful death are not available in admiralty.

An obvious solution is for Congress to modify DOHSA to allow recovery for nonpecuniary damages. Since admiralty common law allows recovery for nonmonetary losses when death occurred in state territorial waters, consistency demands that the same apply to extraterritorial waters. Congress, not the courts, can best bring about the uniformity and logic sought by the *Nygaard* court.

Greg Winters

U.S. v. RIVERSIDE BAYVIEW HOMES 106 S. Ct. 455 (1985)

This case arose when the developer of Riverside Bayview Homes began to place fill materials on low-lying land it owned near Lake St. Clair in Michigan without first obtaining a permit from the Army Corps of Engineers. The Corps, in a suit filed in federal District Court to enjoin the fill, argued that the Clean Water Act prohibits the discharge of dredged or fill materials into "navigable waters" unless authorized by a permit. Corps regulations construe the term "navigable waters" to include wetlands, defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted to life in saturated soil conditions." 33 C.F.R. §323.2 (1985). In the Corps' view, even though the Riverside property was periodically inundated by ground water rather than "navigable" surface water, the company needed a permit before filling the land.

The District Court agreed with the Corps. However, the Sixth Circuit Court of Appeals reversed, holding that in order to be classified as wetlands, and thus come within the Corps' jurisdiction, the land must be "subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation." The United States Supreme Court, reversing the appellate court, required the developer to obtain a permit for his fill activities.

The Supreme Court ruled that the plain language of the Corps' regulatory definition of wetlands completely refutes the holding of the appellate court. It found that the "regulation could hardly state more clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands. . . ." It is a well settled principle of administrative law that an agency's construction of a statute is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. The Court's examination of legislative history indicated that the Corps' claim of broad jurisdiction in bringing areas not specifically "navigable waters" under its permit rule had aroused Congressional opposition during 1977 debate over the Clean Water Act Amendments. However, forces in favor of more expansive jurisdiction won, thereby showing Congressional approval of the Corps' definition of wetlands. The Court therefore concluded that the regulation was reasonable.

The Court also found policy arguments to support the Corps. Congress has stated, and scientific evidence has shown, that protection of wetlands is extremely important in protecting the waters they border. These wetlands often provide pollutant filtering systems, help prevent erosion, and provide habitat and nesting grounds for a variety of creatures, many of which contribute to the general "health" of the water itself. The Court specifically quoted the Corps' interpretation of the role of wetlands in enhancing water

quality: "[T]he regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system . . . For this reason, the landward limit of federal jurisdiction under [33 U.S.C. §1344] must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of the aquatic system."

The Court's ruling acknowledges Congressional intent to include protection of wetlands within the Clean Water Act. In confirming the Corps' jurisdiction over millions of acres of wetlands (such as prairie potholes and Alaskan tundra) previously believed by some to be unregulated, this holding is considered a victory for wetlands preservationists.

Louis Alexander

LAGNIAPPE (A Little Something Extra)

The National Oceanic and Atmospheric Administration's environmental impact statement on the Week's Bay National Estuarine Sanctuary in Alabama is now available. For more information, contact: EPA, Office of Federal Activities, 401 M St., S.W., Washington, D.C. 20460; (202) 382-5075.

Mississippi's Coastal Program passed its most recent assessment by the federal Office of Ocean and Coastal Resource Management. Copies of the findings may be obtained from John H. McLeod, Acting Evaluation Officer, Policy Coordination Division, OCRM, National Ocean Service, NOAA, 3300 Whitehaven St., N.W., Washington, D.C. 20235; (202) 634-4245.

Ocean incineration activities have shifted focus from the Gulf of Mexico to the Atlantic Ocean. EPA has announced plans to issue to Chem Waste Management, Inc., a permit for an experimental burn in the Atlantic Ocean approximately 140 miles east of Cape May, New Jersey. Because of local and Congressional opposition to issuance of the permit, it is unclear whether the burn will take place as scheduled this spring.

A call for papers for Coastal Zone '87 has been announced. The theme of the conference, scheduled May 26-29, 1987 in Seattle, Washington, is "Spotlight on Solutions." For more information, contact: Delores Clark, NOAA External Affairs, Rockville, MD 20852; (301) 443-8031.