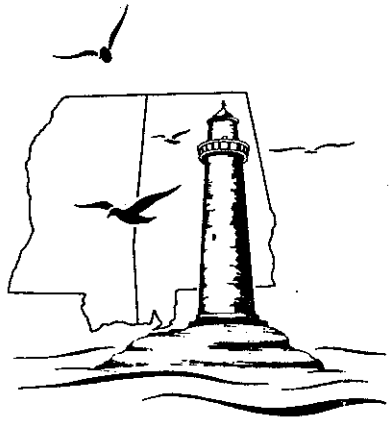
WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium



ARTICLES

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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: Mississippi-Alabama Sea Grant Legal Program, University of Mississippi Law Center, University, MS 38677. We welcome suggestions for topics you would like to see covered in the WATER LOG.

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PROTECTING AMERICA'S WETLANDS
THE FINAL REPORT OF THE NATIONAL WETLANDS POLICY FORUM

INTRODUCTION

In 1987, at the request of the Environmental Protection Agency, the National Wetlands Policy Forum was established to consider and make recommendations on how the nation's wetlands should be protected and managed. Forum membership consisted of state and city government officials, including three governors; environmental groups and business executives; farmers and ranchers; and academic experts. The group's objective was the development of recommendations for the improvement of wetlands policy on local, state and national levels. The following discussion summarizes some of the forum's recommendations.

DISCUSSION

In recent years, there has been a dramatic increase in appreciation of the valuable benefits of our nation's wetlands—their biological productivity, which can rival the richest agricultural lands; their sustenance of nearly one-third of our endangered and threatened species; their provision of breeding grounds for waterfowl and shorebirds; their supply of nursery and spawning grounds for 60-90% of U.S. commercial fish catches; and their roles in decreasing flood damage, reducing erosion, recharging groundwater, filtering sediment, and abating pollution. However, since the lands and the water itself freqently are valuable for other uses, there is often a conflict between the interest of the landowner in converting the wetlands and the interest of society in preserving them in their natural state.

Due to this increased respect for the value of wetlands conservation, there have been numerous government and private programs created to conserve this resource. These programs have slowed, but not stopped, the diminution of the nation's wetlands base. The forum found that a major defect of the current wetlands programs is the lack of a coherent goal. This deficiency has often resulted in inconsistent plans and conflicts among programs. To correct this problem the forum recommended that:

> the nation establish a national wetlands protection policy to achieve no overall net loss of the nation's remaining wetlands base, as defined by acreage and function, and to restore and create wetlands, where feasible, to increase the quality and quantity of the nation's wetlands resource base.

Creating a Coherent Framework

While present wetlands programs include many of the components necessary for successful management and protection of the nation's wetlands, the forum found that a coherent framework was lacking. To remedy this lack of consistency and focus, the forum recommended that federal regulatory responsibilities be delegated to states that have demonstrated the ability to reach prescribed goals and have prepared State Wetlands Conservation Plans. The federal government should provide increased financial and technical resources to the states to assist them in these efforts.

In order to improve existing wetland regulatory programs, the forum suggested, among other things, that the fifty-odd definitions now employed in

the nation's various wetlands programs be replaced by one consistent definition.

Promoting Private Stewardship

Because over half of the nation's wetlands outside of Alaska are privately owned, the forum stressed the implementation of two goals: (1) public education concerning the importance of wetlands to the environmental and economic health of the nation and (2) the establishment of economic incentives to encourage the private sector to protect the public values provided by wetlands. To achieve this second goal, the National Wetlands Policy Forum made several specific suggestions. The forum proposed tax incentives designed to reflect the public benefit derived from protection of the wetlands. Further, it proposed that nonprofit Wetlands Preservation Trusts be established to obtain ownership of conservation easements on wetlands by donation, purchase, or land exchange and that the trusts be empowered to acquire former wetlands in order to restore them to their original state. To provide for situations where the landowner has insufficient taxable income or where the value of the property is too low for tax deductions to provide an incentive, the forum urged that subsidies be made available. The report noted that several such subsidy programs are already in place, although some have experienced a reduction in funding in recent years and the programs have not been coordinated to respond to overall goals. Thus, the forum recommended that Congress establish a National Agricultural Wetlands Reserve Program to preserve 5 million acres of wetlands and restore 2.5 million acres. The forum emphasized that, over the long run, the initial outlay of funds for this purpose would likely be more than offset by reduced payments for agricultural income support programs.

Establishing Government Leadership

Government programs, themselves, often directly cause destruction of wetlands. For instance, a study conducted for the U.S. Department of the Interior disclosed that control and drainage projects undertaken by the U.S. Army Corps of Engineers and the U.S. Soil Conservation Service were the single most significant source of losses in the Mississippi Delta region, causing at least 25% of the losses which have taken place in the area since 1935. Similar results have taken place in other parts of the nation due to governmental activities. To correct this problem the forum recommended that Congress pass legislation modeled after the Coastal Barriers Resources Act, which would restrict federally-supported activities in especially valuable wetlands areas.

Providing Better Information

Of the information gaps concerning wetlands management, perhaps none is more significant than the lack of information about where wetlands exist. Landowners may be unaware that their property contains wetlands. Although the U.S. Fish and Wildlife Service is currently preparing a set of maps to alleviate this problem, this effort is being based primarily on aerial surveys and should be verified in the field. The forum advised that increased resources be devoted to the mapping efforts. A related suggestion was that the United States obtain better information on the status of its wetlands, the rate of alteration and the causes of this alteration, and the effectiveness of existing protection techniques.

Restoring and Creating Wetlands

In order to achieve the forum's goals of no net loss of wetlands over the short

term and increasing the wetlands base over the long term, programs of wetlands restoration and creation must be initiated. Although there is general agreement in the scientific community that there can be no exact duplication of wetlands, there is evidence that some kinds of wetlands may be restored or created to fulfill many of the same benefits.

The forum recommended that a committee, created by the National Academy of Sciences, develop technical guidance, representing the latest scientific information, to direct restoration and creation projects. It further proposed that Congress establish wetlands restoration as a duty of appropriate federal agencies and that there be organized a public/private Wetlands Restoration Initiative with the mission of seeking opportunities for restoring wetlands—with particular emphasis on restoring wetlands on the Louisiana coast, where especially high wetlands losses have occurred largely as the effect of past government projects.

Financing Wetlands Protection and Management

The forum, sensitive to budgetary constraints, advocated innovative funding mechanisms, such as increasing revenue from sources related to activities that use or degrade wetlands areas, permit fees, property transfer fees, and surcharges on federal flood insurance. The forum's report pointed out that, while budgetary constraints may mandate delay of implementation of all the proposals, this delay will itself be costly — both environmentally and economically. The cost of re-creating wetlands in the future will be much greater than the costs of preventing their continued destruction.

CONCLUSION

Studies indicate that the nation has already lost over half the wetlands that existed in the contiguous United States when European colonization began. The National Wetlands Policy Forum's message is that it is imperative that we recognize the value of preserving and restoring wetlands and that we begin to implement a program to protect this resource. Some of the forum proposals will require increased federal and state funding, while others entail little or no cost. In any case, delay may be more costly both in economic and environmental losses.

Mary B. Morrison

MISSISSIPPI'S BLUE RIBBON COMMISSION ON PUBLIC TRUST TIDELANDS
Summary of the Final Report

INTRODUCTION

Mississippi Secretary of State Dick Molpus recently appointed a 26-member Blue Ribbon Commission on Public Trust Tidelands to guide the state in developing a comprehensive tideland leasing program. This ambitious effort was made possible by the United States Supreme Court's decision in *Phillips Petroleum Co. v. Mississippi,* 108 S.Ct. 791 (1988), which affirmed a Mississippi Supreme Court ruling that defined the geographic scope of the public trust doctrine along Mississippi's Gulf Coast. The opinion establishes that, upon its entrance to the Union in 1817, Mississippi received in trust all coastal lands subject to the ebb and flow of the tide regardless of actual navigability.

The Public Trust Commission was charged with the responsibility of creating an equitable plan to manage public trust tidelands for the benefit of all citizens of Mississippi and with the specific duty of locating the mean high tide water mark that divides public and private properties. The commission's final report containing over 30 recommendations was issued on December 8, 1988. In the report, the commission's five committees addressed the problems of the boundary line as well as lease management, conservation and development, taxation and littoral/riparian rights. A summary of each committee's recommendations follows.

DISCUSSION

Boundary Committee

The Boundary Committee concluded that, based on available information, a boundary line cannot be drawn across the entire coastline in order to separate privately held uplands from public trust tidelands as of the time Mississippi attained statehood in 1817. This conclusion was based on the lack of reliable general maps of Gulf Coast boundaries during the early 1800's. However, the Boundary Committee discovered accurate maps that date from the 1920's. These and other official maps, if studied together with accurate and reliable land surveys, may indicate the approximate location of the mean high tide water mark to within several feet. Unfortunately, these maps do not cover the entire Mississippi Coast.

To help correct this deficiency, the Boundary Committee proposed a number of specific recommendations regarding boundary determinations. First, as is already authorized under Mississippi law, the owner of upland contiguous property may gain land through natural accumulation of land (accretion) or natural withdrawal of the sea (reliction). In contrast, the state may gain additional trust lands when natural inland expansion of the waters covers lands not previously subject to the tide's ebb and flow. Thus, in those areas along the coast where there has been no development, the current boundary between privately owned uplands and public trust tidelands is today's mean high tide line.

Second, the sudden change in topography (avulsion) shall not affect boundaries. Third, title to uplands that are dredged remains with the upland owner. Fourth, the secretary of state should designate those lands that are not subject to the trust and its lease requirements. Fifth, the secretary of state should determine the boundary using the earliest available reliable information of the type admissible in a court of law. Sixth, the secretary of state should propose regulations or statutes concerning procedures for locating tidal boundaries.

Seventh, the secretary of state should prepare, certify and publish notice of a "Preliminary Map of Public Trust Tidelands in Mississippi." Eighth, and finally, the secretary of state should seek legislation which establishes procedures for review and appeal of boundary decisions.

The Boundary Committee also addressed the issue of accretion due to artificial conditions made by a stranger. Two Mississippi decisions have held that title to land that has been filled by a stranger to the title of the upland owner accrues to the benefit of the upland owner. *Moore v. Kuljis,* 207 So.2d 604, 614 (Miss. 1967); *Harrison County v. Guice,* 140 So.2d 838, 842 (Miss. 1962). While these holdings have been criticized by the United States Court of Appeals for the 5th Circuit in *U.S. v. Harrison County,* 399 F.2d 485, 491 (5th Cir. 1968) on the ground that section 95 of the Mississippi Constitution prohibits donation of public lands to private persons, the Mississippi Supreme Court has never directly addressed this issue.

In balancing the equities of the state and the private property owners, the Boundary Committee recommended adoption of a public trust policy consistent with *U.S. v. Harrison County.* Although finding *U.S. v. Harrison County* to be more consistent with the public interest, the committee suggested that strict application of that decision would probably not be equitable in all situations and noted that only the Mississippi Supreme Court can resolve and balance those equities.

Lease Program Management Committee

The Lease Program Management Committee set forth its recommendations as to the proper leasing regime for public trust tidelands in Mississippi. Citing opportunities for conservation, reclamation and preservation of these lands, the committee offered six recommendations.

First, generally, all persons occupying public trust tidelands must have a lease unless such occupancy is a legitimate exercise of that person's littoral/riparian rights that are exempt from permit requirements under the regulations of the Bureau of Marine Resources.

Next, when conflict arises between private use and public trust use the public trust should prevail. However, the aggrieved occupant may appeal this administrative decision.

Third, several state agencies should be involved in managing the program. The secretary of state shall serve as trustee and general administrator of the public trust tidelands and the revenues it produces. In cooperation with the secretary of state, the governor, the Department of Wildlife Conservation's Bureau of Marine Resources, Department of Natural Resources' Bureau of Geology and the attorney general should coordinate all efforts to ensure protection of the trust and maximization of revenue.

Fourth, lease rental should be set according to two categories of leaseholders. Group one consists of people who began occupancy before 1973; group two includes those occupants whose initial occupancy started after July 1, 1973.

Fifth, there should be a rental discount for public access and, if applicable, a surcharge for a lease in a protected area. If the applicant provides the required public access, that person will receive a 30% discount subtracted directly from the base rental calculation. Public access is defined as direct access to the waters and water bottoms by the general public around the perimeter of the leasehold.

Sixth, the Lease Program Management Committee recommended that there

be a casualty clause in every lease in order to offer the leaseholder a chance to terminate the lease in the event of destruction of the property as a result of a natural disaster. Further, leases should descend to lawful heirs of a lessee in the event of the lessee's death during the term of the lease. Next, the lessee may be given the option to renew the lease. Upon written request these leases may be transferable by assignment or sublease. Finally, the committee suggested that the secretary of state seek legislation to increase the maximum term of a lease of public trust tidelands to forty years.

Conservation and Development Committee

Following the United States Supreme Court's reaffirmation of the public trust doctrine as established by the Mississippi Supreme Court in *Cinque Bambini Partnership V. Mississippi,* 491 So.2d 508 (1986), the Conservation and Development Committee considered the effect of such reaffirmation upon conservation and development issues. The committee voiced several concerns, the first being the balancing of orderly economic development against the public's right of access to the public trust tidelands.

In addressing this first issue, the committee stressed that any economic development that destroys wetlands within the public trust tidelands must not be allowed except for a higher public purpose. Secondly, the committee strived to ensure effective utilization of minerals and other natural resources over, on, or below public trust tidelands. Recognizing the need for exploration and extraction of hydrocarbon and other mineral resources as well as the need to halt continued deterioration of vegetated coastal wetlands through industrial, commercial and residential development, the committee found that existing state and federal laws and regulations would, if properly applied, adequately serve to balance these needs.

Additionally, the committee offered suggestions to ensure compliance with the Mississippi Coastal Wetlands Protection Law of 1973. Miss. Code Ann. §49-27-1 (Supp. 1987). That law prohibits the unwise and inappropriate destruction of wetlands in Mississippi. The committee urged continued enforcement of this law, with minor modifications, and suggested that a percentage of the funds derived from leases of tidelands be used by the Bureau of Marine Resources for wetlands management and protection.

Another concern of the committee involved the issue of sufficient protection and conservation of the entire marine (estuarine) ecosystem. The committee emphasized the need for continued efforts to restore, protect, and conserve the public trust tidelands for the benefit of all Mississippi citizens. To promote these efforts, the committee favors the use of funds from leases of public trust tidelands.

The committee addressed the definition of "conservation" and the scope of conservation activities to be permitted on public trust tidelands. It noted that conservation is the careful preservation and protection of public trust tidelands via planned management of those wetlands to prevent their exploitation, destruction or neglect. Also, the committee suggested that all practical and feasible steps be taken to achieve these desired plans. This includes the recommendation that no lease fee be charged for preserved and/or restored wetlands.

Having defined "conservation", the committee also considered the term "development" and suggested what development activities should be permitted on public trust tidelands. Here, the committee defined "development" as any

regulated activity specified in section 49-27-5(c) of the Coastal Wetlands Protection Law, which grants exclusive use of the wetlands to anyone for benefits not specifically defined or "granted" as riparian "rights."

The committee recommended that no lease on public trust tidelands be required for water-dependent activities with a higher public purpose if such activities do not degrade or destroy vegetated wetlands. Where such damage appears likely, appropriate steps ensuring mitigation should be satisfactorily completed or assured. Next, all commercial and private water-dependent development activities should be permitted with a lease on nonvegetated public trust tidelands, but only if there will be no long-term damage to or loss of wetland functions. Leases for hydrocarbon, mineral and aquaculture activities should continue, but the governmental entities involved should coordinate their leasing activities with each other as well as with the secretary of state.

The committee also decided which types of private and/or commercial development should not be permitted on public trust tidelands in the future. Stressing that no lease should be granted for any project that would directly or indirectly degrade or destroy vegetated public trust tidelands, the committee included all commercial, private and most public development projects in this recommendation.

Comparing and contrasting the interests in conservation and development, the committee raised the following questions: are the terms "conservation" and "development" mutually exclusive and, if not, which term has primacy and under what conditions does such primacy exist? In answering these questions, the committee found that except for a few higher public purpose projects, the conservation of wetlands and wetland resources must take precedence over development.

The committee considered whether monies derived from public trust tideland leases should be used for wetlands restoration and enhancement in the three coastal counties. Stressing its belief in the protection, enhancement and restoration of Mississippi's public trust wetlands, the committee strongly urged that the trust receive the significant portion of the monetary benefit derived from the leases.

The Conservation and Lease Program Management Committee addressed one further concern: how to amend and/or strengthen the Mississippi Coastal Wetlands Protection Law of 1973, Miss. Code Ann. §49-27-1 (Supp. 1987). The committee, believing in the "higher public interest" concept of Mississippi's law of public trust, recommended that the 1973 wetlands law be amended to conform with the recommendations of this report as well as with the changes in state government since 1973. It is the opinion of the committee that all future development (leasing) serve a "higher public purpose" only if the following conditions are met:

> (1) that no net loss of wetland quantity or quality (natural functions) result from such leasing; (2) that funds derived from tideland leases be used to manage, preserve, enhance and restore tidelands including, where appropriate, purchase of adjacent non-public trust wetlands and/or buffer strips.

Taxation Committee

In its report on taxation of public trust tidelands, the Taxation Committee offered three recommendations. First, taxes should be imposed only as to properties that

require a lease from the secretary of state's office. Second, that lessees of class one property (single family, owner occupied property) should be assessed at 10% of the lease consideration paid by the lessee. Class two property (all other real estate) should be assessed at 15% of the lease consideration paid by the lessee. As to both class one and class two properties, the leasehold interest would appear as a separate assessment on the local county land rolls. Finally, the local taxing authority would levy millage accordingly and all taxes collected by taxing authorities would be collected by the local collectors.

Littoral/Riparian Rights Committee

The Littoral/Riparian Rights Committee filed its recommendations to affirm and protect those riparian rights presently enjoyed by owners of waterfront property. Citing section 49-15-9 of the Mississippi Code, the committee indicated that riparian owners have the right to plant and gather oysters as well as the right to erect bathhouses and other structures. These rights remain unaffected by the Coastal Wetlands Protection Law provided that such activities do not unreasonably obstruct the ebb and flow of the tide. When this is the case, no permit would be required from the Bureau of Marine Resources.

The committee proposed that these activities by riparian owners be exempt from the requirement of a lease as well as from any taxation proposals adopted by the Tidelands Commission, at least to the extent that the activities are exempt from the requirement of a permit under section 49-27-7(e) of the Coastal Wetlands Protection Law. As merely an exercise of littoral or riparian rights, these "minor activities" do not require a permit, but they do require a certificate of waiver from the Bureau of Marine Resources.

The committee also suggested that those persons who are required to obtain a permit from the Bureau of Marine Resources should also be required to have a lease issued by the state. The test for deciding whether an activity requires a permit rather than merely a certificate of waiver depends upon the degree of obstruction of the ebb and flow of the tide and not upon the specific use (e.g. commercial, residential) of the structure.

Lastly, the committee discussed Miss. Code Ann. §29-1-107 (1972 & Supp. 1987), which permits the secretary of state, upon approval of the governor, to rent or lease surface lands or submerged lands owned by the state. The commission recommended that this provision be construed to preclude leases in littoral/riparian areas to persons other than the upland contiguous property owner or his assignee.

CONCLUSION

It is likely that implementation of the Public Trust Commission recommendations will encounter stiff public and private opposition. Many coastal property owners suspect that the state is attempting to confiscate lands that have been in their families for generations. Conversely, some non-coastal residents fear that the commission will attempt to give away state tidelands to private interests.

The success or failure of the commission will ultimately depend on whether or not the secretary of state can garner enough support in the legislature to enact meaningful legislation that incorporates a significant number of commission recommendations. Without appropriate legislation, the secretary of state will lack the tools necessary to properly manage Mississippi's public trust tidelands.

LEGAL ISSUES RAISED BY THE PRESIDENTIAL PROCLAMATION TO EXTEND THE TERRITORIAL SEA

Letter from Michael J. Matheson, Acting Legal Advisor to Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel (August 15, 1988)

INTRODUCTION

On December 27, 1988, President Reagan issued Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (1989), extending the territorial sea of the United States from its present three nautical mile breadth to a distance of twelve nautical miles. Prior to the issuance of this proclamation, the Department of Justice studied the legal issues involved. The inter-department memorandum, prepared by the Office of Legal Counsel, addressed several questions: (1) the President's authority to assert jurisdiction or sovereignty over an extended territorial sea by Presidential proclamation; (2) Congress' authority to make an assertion of sovereignty over the extension; and (3) the effect such a proclamation would have over domestic legislation—particularly the Coastal Zone Management Act.

ANALYSIS

The Territorial Sea

Before considering the specific issues at hand, the Justice Department memorandum discussed three concepts: the meaning of "territorial sea" as it is used in international law; a description of other areas of the sea over which nations can exert some degree of control or influence; and the distinction between a claim of sovereignty over the territorial sea and a claim of jurisdiction over other areas of the sea.

The territorial sea is a strip of water immediately adjacent to the coast of a nation. This area can extend from a nation's coast to a distance of twelve nautical miles, the maximum breadth allowed under international law. Most nations now assert sovereignty over the full twelve-mile allowance; however, the United States has followed the traditional practice of claiming a three-mile territorial sea. Whatever size it claims, a nation may assert full sovereignty over its territorial sea, treating the area the same as it does its land territory.

In areas other than the territorial sea, such as the contiguous zone, the continental shelf, and the exclusive economic zone (EEZ), a nation may not assert full sovereign control. Rather, in these areas a nation is allowed more limited kinds of jurisdiction under international law. For instance, a nation may only exercise control incident to its customs, fiscal, immigration, or sanitary regulations in the contiguous zone. On its continential shelf, a nation's authority is restricted to control incident to exploration and exploitation of natural resources. In a nation's exclusive economic zone, its control is limited to activities related to economic exploration and exploitation, scientific research, and environmental protection. Outside of these zones a nation has no control over the actions of other nations absent a treaty or other agreement.

The President's Authority to Assert Jurisdiction and Sovereignty over the Territorial Sea

The Justice Department memorandum concluded that the President can assert jurisdiction over the territorial sea, and thus claim a new area for the U.S. for international purposes. While in the Department's view the most legally secure

method of making such an assertion would be by entering into a treaty with other nations, it asserted that the Constitution provides ample authority for the president to proclaim jurisdiction unilaterally.

The Department based this opinion on what it termed the President's "constitutional authority as the representative of the United States in foreign relations." As support for the position that the Presidency alone is the office that may handle matters of foreign relations, the Department cited President Truman's 1945 proclamations concerning the Continental Shelf and fisheries management, and President Reagan's 1983 proclamation of jurisdiction over an exclusive economic zone extending two hundred miles from the coast of the United States. However, the Constitution does not specifically address unilateral assertion of jurisdiction over the territorial sea by the President, and the only direct precedent for such action was President Washington's original claim of the three-mile territorial sea in 1793.

According to the Justice Department, a more difficult issue is whether the President may assert *sovereignty* over the extended territorial sea. The key difference between asserting jurisdiction and asserting sovereignty is that unlike claiming territory for the country by asserting jurisdiction, by asserting sovereignty the area would be considered part of the U.S. and treated identically to land territory. The Justice Department concluded that historically the executive branch has had the power to proclaim sovereignty over territory by "discovery and occupation." This power stems from the President's constitutional position as the "representative organ of the government regarding foreign affairs." For support the memorandum cited two instances in which the President acquired territory unilaterally: the Midway Islands and Wake Island. While the Justice Department did allow that the issue may be "open to some question," it maintained its position that the authority resides with the President. To insure that there would be no room for dispute about this authority, the Department recommended that the proposed proclamation specifically state that it is asserting jurisdiction *and* sovereignty over the extended territorial sea.

Congress' Authority to Assert Sovereignty over the Territorial Sea

The Justice Department also considered whether H.R. 5069, a bill that would legislatively establish a territorial sea with a width of twelve miles, was within the constitutional power of the Congress. The memorandum stated that Congress has never asserted sovereignty over the territorial sea, presumably because the Executive office — not the legislature — is the branch of government imbued with the power to act as the representative for the U.S. in foreign affairs. The Justice Department acknowledged that questions remain regarding its conclusion, but held to the position that the only clear congressional power to acquire territory flows from its constitutional power to admit new states into the Union. Without further elaboration the Department stated its belief that H.R. 5069 presented serious constitutional questions. For this reason it supported the proposed Presidential proclamation as a more legally sound method of extending the territorial sea.

The Effect of the Proclamation on Domestic Law

The Justice Department made clear that the proposed proclamation should state explicitly that it is not intended to affect domestic law. However, it acknowledged that Congress may have specifically tied some statutes to the full extent of the

United States' territorial sea under international law rather than a strict three mile limit. Thus, attention must be given to legislative intent.

Consideration of all of the statutes that could be potentially affected by the proclamation was beyond the scope of the memorandum. Instead, it focused specifically on the Coastal Zone Management Act of 1972, (CZMA) 16 U. S. C. §1464 (1984).

As the memorandum outlined, the question of exactly what area the CZMA covers is, as with other federal statutes, a question of legislative intent. In some instances the language used by Congress simply seems to overlap or coincide with the existing territorial sea, for instance, "three miles seaward from the coast of the United States." Similarly, Congress at times has used the term "territorial sea," defining it as "three miles seaward from the coast of the United States." In these instances, the statute would not be affected by the proclamation. However, a more difficult situation arises when dealing with a statute with more ambiguous language, for example, a statute using the term "territorial sea" without definition. Then resort must be had to further investigation of legislative intent, looking to such sources as the legislative history of a statute, interpretation of the statute by the executive and judicial branches, and determining the meaning of similar statutes dealing with the same subject matter for the purposes of analogy.

The CZMA uses the term "territorial sea" without definition, thus, the memorandum delved behind the Act in an attempt to determine Congress' intent for the usage of the term. By examining the purpose, structure, and legislative history of the Act, the Justice Department concluded that the better view is that Congress did not intend for coverage under the CZMA to expand with any extension of the territorial sea. However, the Department recognized that this conclusion is not entirely free from doubt. Consequently, it recommended that Congress enact legislation to accompany the proposed proclamation. Such legislation would prohibit "the expansion of the coverage of any domestic statute by the extension of the territorial sea." In the Department's opinion, such an express statement from Congress would preclude any argument that the CZMA or any other federal legislation should be expanded to include an extended territorial sea.

The Justice Department also took the position that states would not be able to assert jurisdiction over the expanded territorial sea. While it remarked that it was not necessary for the purposes of the present memorandum to decide the issue, the Department asserted that an expanded territorial sea for foreign policy purposes would not automatically give adjacent states rights over the area.

CONCLUSION

The Justice Department memorandum investigated the legal issues surrounding the issuance of a Presidential proclamation to extend the territorial sea and completely supported its legality. While acknowledging that flaws may exist with some of its arguments, the Department expressed favor with such an action, providing the President the needed support for his proclamation to extend the territorial sea to twelve miles. The proclamation specifically states that it is not intended to extend or otherwise alter any existing federal or state law. Presumably, this will prevent Congress or any individual state from claiming jurisdiction over the extension by virtue of any state or federal laws currently in place. However,

many questions regarding potential state claims were not adequately addressed in the memorandum. Unless Congress follows the Justice Department's suggestion and passes legislation expressly giving up states' rights over the extended territorial sea, it is likely that many disputes between federal and state authority over the area will emerge in the future.

Laura Howorth

UNITED STATES v. RIOSECO
845 F. 2d 299 (11th Cir. 1988)

Lacey Act, which makes it offense against U.S. to import, export, transport, or possess fish, wildlife, or plants taken in violation of any U.S. or foreign law is not an unconstitutional delegation of legislative power to foreign governments.

INTRODUCTION

On May 17, 1988, the U.S. Court of Appeals for the Eleventh Circuit affirmed a district court ruling that the Lacey Act, 16 U.S.C. §§3372 and 3373 (1982) is not an unconstitutional delegation of Congress' legislative power to foreign governments. The Lacey Act incorporates foreign law by making it an offense against the U.S. to import, export, transport, or possess fish or plant life taken in violation of foreign law.

FACTS

In April 1986, the U.S. Coast Guard cutter *Shearwater* was making a routine patrol within the Bahamas' 200-mile exclusive economic zone (EEZ). The cutter believed that a vessel operating within the EEZ was engaged in fishing. The vessel, which belonged to Rioseco, was stopped and boarded. The Coast Guard has the authority to stop, board, and inspect vessels pursuant to its enforcement duties with respect to U.S. fishing, narcotics and safety laws. Once aboard, the Coast Guard routinely questioned Rioseco, inquiring about his identity, vessel registration, and other information.

During this inquiry, the Coast Guard discovered that Rioseco was fishing without a Bahamian license. Bahamas law requires that anyone fishing within its EEZ must have a license. Failure to have a Bahamian license not only violates Bahamas law, but also U.S. law, pursuant to the Lacey Act. Because of this violation, the Coast Guard issued Rioseco a civil citation and ordered him to return to the U.S.

Upon contacting the U.S. Attorney and U.S. Marine Fisheries Services in Miami, the Coast Guard discovered the Rioseco had violated the Act on three previous occasions. Based on this information, it determined that criminal prosecution was necessary. The Guard tracked and re-boarded the vessel. During the second boarding, Rioseco was arrested and administered *Miranda* warnings. (*Miranda* warnings must be given prior to any interrogation initiated by law enforcement officers after a person is taken into custody. The person must be warned that he has the right to remain silent, that any statement he makes may be used against him, that he has the right to have an attorney present, and that if he cannot afford an attorney, the court will appoint one for him.)

ANALYSIS

Rioseco appealed his conviction, contending that the Lacey Act is unconstitutional because it delegates legislative power to foreign governments. Such a delegation, argued Rioseco, violates Art.I, §1 of the Constitution, which requires that "All legislative powers herein granted shall be vested in Congress... ." The Eleventh Circuit noted that three other appeals courts had rejected smiliar challenges to the Act's constitutionality. Those courts reasoned that Congress could have regulated this area of the law, but that it instead chose to let foreign law control. The court stated that Congress' purpose in passing the Act was to eliminate illegal

trade in wildlife and to protect wildlife in areas such as the Bahamas' EEZ. Congress outlawed the taking, selling, and transporting of this wildlife when doing so violated foreign law. Accordingly, the court reasoned that Congress did not delegate any power to foreign governments, but only set its goals and implemented them in the way it considered most effective — by relying on foreign law. Furthermore, the court pointed out that it was Congress and not any foreign government that established the penalties for violating the Act.

With regard to another of Rioseco's claims, the district court held that he was not entitled to *Miranda* warnings during the Coast Guards' initial boarding of his vessel because he was not then "in custody" — an element that must be present for *Miranda* warnings to be required. In affirming this decision, the circuit court relied on its earlier decisions holding that the Coast Guard's routine stopping, boarding, and inspection of U.S. vessels on the high seas did not amount to custodial detention and that there was therefore no need to give Rioseco *Miranda* warnings.

CONCLUSION

Based upon *Rioseco* and similar decisions, commercial fisherman should be on notice that any violation of foreign game and fish laws will also be considered a violation of the U.S. Lacey Act. Furthermore, they should be aware that the Coast Guard can board their vessels at anytime, that such boardings will not be viewed as arrests or custodial detention, and that because these boardings will not be viewed as such, the constitutional safeguards afforded by *Miranda* will not be available to them.

Bob Wilbert

"BLUEPRINT FOR THE ENVIRONMENT" POLICY RECOMMENDATIONS ADDRESSED TO THE BUSH ADMINISTRATION FOR THE PRESERVATION OF OUR OCEANS AND COASTLINE

INTRODUCTION

"Blueprint for the Environment" is a cooperative effort by members of 18 of America's largest environmental organizations to develop a comprehensive set of recommendations on the environment to be presented to the incoming Bush administration. In an open letter to President Bush, Project Blueprint stated that environmental issues rank with the threat of nuclear war as the two most serious issues facing the new administration. While Blueprint's 700 specific recommendations encompass all areas of the environment, this article will only be concerned with those proposals related to the protection of our oceans and coastlines.

Mr. Clifton Curtis of the Oceanic Society served as chairperson of Project Blueprint's Ocean and Coastal Task Force, comprised of experts from over thirty national, regional, state and local environmental groups who work on ocean or coastal issues. During the period between November 1987 and November 1988 the Task Force developed approximately seventy-five specific recommendations concerning our oceans and coastal areas. These suggestions have been delivered to high-level officials in the Environmental Protection Agency, Department of the Interior, U.S. Coast Guard, U.S. Navy, National Science Foundation, and National Oceanic and Atmospheric Administration.

The Ocean and Coastal Task Forces' recommendations focus on three primary areas. These include a prohibition on the release of hazardous substances into marine waters, the establishment of special protection for fragile ecosystems, and an increase in the use of domestic and international laws and forums to promote environmentally sound marine policies. A closer look at some specific recommendations follows.

DISCUSSION

While space prohibits an examination of all seventy-five recommendations made by the task force concerning our oceans and coastlines, a representative selection of Project Blueprint's suggestions will be discussed and grouped according to the governmental agency to which the recommendation is addressed.

Department of the Interior

Recommendation: The Secretary of the Interior should revise the 5-year Outer Continental Shelf Leasing Program to exclude sensitive areas and ensure that offshore oil activities do not harm ecologically valuable coastal and marine areas.

According to Project Blueprint, the current 5-year Offshore Leasing Program proposes leasing in some of the nation's most sensitive coastal and marine areas. It is, therefore, meeting resistance from many coastal states, congressional representatives, and environmental groups. Blueprint proposes the specific lease sales planned for 1989 be cancelled, including sales in the Eastern Gulf of Mexico, Central California, and the Washington/Oregon Coast. Each lease should be scrutinized with sale leases in sensitive areas deleted.

Project Blueprint notes that under Section 18 of the Outer Continental Shelf Lands Act (OCSLA), the Secretary has authority to make the suggested revisions

to the 5-year Leasing Program. Changes in law or regulations are not necessary to implement this recommendation.

Recommendation: The Interior Department should request appropriations for, and conduct a study which analyzes the effectiveness of the Coastal Barrier Resources Act in accomplishing its legislated goals to reduce wasteful federal expenditure, loss of human life and damage to fish and wildlife habitats.

Since the Coastal Barrier Resources Act (CBRA) was passed six years ago, there has been no thorough examination of how development has been affected by the Act or whether current enforcement methods of CBRA's prohibition on the use of federal development subsidies within the Coast Barrier Resources System are adequate. Blueprint stated such a study would be useful in determining any strengthening changes to be implemented to the Act.

No request for an increase in funds for either fiscal year 1990 or 1991 is stated. However, Project Blueprint suggests that the funds needed to conduct this study be appropriated from the Interior Department budget.

Recommendation: The Minerals Management Service should cancel its leasing and regulatory program from hard minerals under the Outer Continental Shelf Lands Act and support new stand-alone legislation similar to the National Seabed Hard Mineral Resources Act (H.R.1260).

Project Blueprint's recommendation would eliminate the two major problems they perceive with the current leasing program for hard minerals under the OSCLA. First, the Department of the Interior's authority extends only to the limit of the continental shelf and not to the 200-mile Exclusive Economic Zone (EEZ). Secondly, Project Blueprint states that the current status of OCSLA leaves far too much discretion to the Secretary of the Interior and is inadequate for the purpose of developing an environmentally sound hard mineral management program.

To implement such a recommendation "Blueprint for the Environment" is not suggesting any budget increase, but rather that the current hard minerals leasing program be abolished and the Department of Interior support legislation similar to the National Seabed Hard Minerals Resources Act (H.R.1260).

Executive Office of the President

Recommendation: The President should act to protect our oceans and coasts by taking immediate steps to achieve widespread acceptance and ratification of the 1982 Law of the Sea Treaty, ban ocean dumping and assure that the Outer Continental Shelf oil and gas leasing program exclude environmentally sensitive areas.

Besides requesting President Bush to declare 1990 the "Year of the Coast" through a presidential proclamation, Project Blueprint would like the president to use the power of his office to direct governmental agencies, especially the Interior Department, to support environmentally responsible attitudes. The President should direct EPA to deny all future and pending permits for ocean dumping of sewage sludge and industrial waste. This moratorium on ocean dumping should be combined with efforts to secure an international end to ocean dumping. Blueprint strongly encourages EPA to continue its ban on ocean incineration as well. President Bush is further encouraged to make a number of specific environmental policy recommendations to agencies such as the National Oceanic and Atmospheric Administration, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

Department of Transportation

Recommendation: The Secretary of Transportation should more effectively protect marine and coastal environments from the inevitable occurrence of oil spills by establishing a comprehensive oil spill liability and compensation regime.

This recommendation would require the Secretary of Transportation to support legislation for the establishment of a package of international, national, and state laws to compensate victims of oil spills as well as to provide funds to ensure rapid and effective cleanup responses. Project Blueprint states that the current status of the law provides for inadequate compensation and damage remedies and notes that many spills go unpunished. Further and immediate Congressional action is still needed. However, it stresses that its request for more federal governmental intervention should not preempt coastal state law.

Recommendation: The Secretary of Transportation should eliminate plastic pollution in the ocean from vessel sources by rigorous implementation and enforcement of Plastic Pollution Act of 1987 and MARPOL Annex V.

Hundreds of thousands of marine creatures fall victim to plastic pollution in the ocean every year. As the United States has ratified Annex V of MARPOL, a treaty which bans all plastic discharge from ships, Project Blueprint recommends that the Secretary of Transportation encourage the Coast Guard to begin enforcement of that treaty. It requests the Secretary to allocate necessary resources to implement regulations, particularly resources to facilitate necessary surveillance and enforcement. No specific amounts are mentioned, nor is a source of funding given for the increased cost of plastic pollution enforcement.

Environmental Protection Agency

Recommendation: The Environmental Protection Agency should seek to establish an Aquafund Program either as part of Superfund or as a separate program. It should assess the extent of contaminated sediments in our waterways, prioritize sites, undergo pilot demonstration clean-up programs, and fund full scale clean up activities utilizing destruction and detoxification technologies.

In this recommendation addressed to the EPA's Assistant Administration for Water, Blueprint asserts that contaminated sediments and toxic "hot spots" exist in many harbors and waterways around the nation. Pollutants such as PCBs work their way up the food chain and are finally ingested by human beings. No funding or policy implementations are suggested, only that the work be done.

In addition to the specific recommendations discussed, "Blueprint for the Environment" also suggests shifting the living marine resources research and management focus of the National Marine Fisheries Service (NMFS) from a single species to a multi-species/ecosystem approach; strengthing fisheries management enforcement activities by NMFS in relation to threatened and protected species; ceasing the Army Corps of Engineers' overflow dredging operations in contaminated sediment areas; and tightening EPA's Ocean Discharge Criteria requirements and restrictions under the Clean Water Act.

CONCLUSION

"Blueprint for the Environment" offers the Bush administration a collection of generally achievable recommendations to improve the livability of our planet. While Blueprint can occasionally be faulted for not adequately explaining how its recommendations will be funded and implemented, it is quite successful in

reemphasizing the need for increased government stewardship over the environment, especially by the executive branch.

A copy of the "Blueprint for the Environment" may be obtained by telephoning 1-800-426-5387.

John Moody

COMMERCIAL FISHING INDUSTRY VESSEL SAFETY ACT OF 1988
Pub. L. No. 100-424, 102 Stat. 1585 (1988)

INTRODUCTION

Public Law No. 100-424, 102 Stat. 1585 entitled Commercial Fishing Industry Vessel Safety Act of 1988 was approved September 9, 1988. The Act amends 46 U.S.C. §4501 (1976) and seeks to provide regulations for the safety of commercial fishing vessels operating primarily on the high seas. The legislation creates an advisory committee to assist in the enforcement and regulation of this Act and provides for the creation and enforcement of agreements between seamen and vessel masters. A summary of the Act's most important provision follows.

DISCUSSION

Safety Equipment On All Vessels

The Act applies to any uninspected fishing vessel, fish processing or fish tender vessel but not to carriage of bulk dangerous cargoes regulated under 46 U.S.C. §3701 (1976). The standards mandate the use of specified safety equipment including a readily accessible fire extinguisher; a minimum of one life preserver of each individual on board; an efficient flame arrestor or similar device on each carburetor of any engine which uses gasoline; proper ventilation of all enclosed spaces including engine and fuel tank compartments; visual distress signals; a bouyant apparatus if the vessel is of the type prescribed by the Secretary of Transportation to be equipped with such a device; and alerting and locating equipment.

Regulation of Ocean Going Vessels and Vessels with 16 or More Individuals

The Secretary is authorized to prescribe regulations for ocean going vessels or those which operate with 16 individuals or more. These regulations are to govern the use of alerting devices, life boats or rafts, immersion suits, navigation and first aid equipment. The Secretary is further authorized to provide regulations for vessels coming under this Act built after December 31, 1988 or which undergo a major conversion completed after that date.

Fish Processing Vessel Certification

46 U.S.C. §4503 (1976), will now require certification that a fish processing vessel meets all classification and survey requirements. Certification is to be made by the American Bureau of Shipping or other approved organization. Any vessel not meeting the required standards or failing to be certified may be required to take reasonable steps to correct the deficiency which may include returning the vessel for mooring until the condition is satisfied.

Exemptions

The Secretary of Transportation may provide regulations for exempting vessels for good cause. Vessels which are under 36 feet in length and not operating on the high seas are exempted from having to carry lifeboats sufficient to accomodate all individuals on board.

Penalties

The penalty for violating this chapter has been raised from $1000 to $5000 and the vessel may still be liable *in rem* for the penalty. (*In rem* is a technical term to designate action aganist specific property; thus the vessel may be disposed

of to satisfy the penalty if it is not paid by the vessel owner.) A willful violation may be punished with a $5000 fine and/or one year imprisonment.

Advisory Committee

The Act provides for the impaneling of the Commercial Fishing Industry Vessel Advisory Committee; a seventeen member committee whose function will be to advise and consult the Secretary and Congress on revisions and other matters relevant to this Act, including a plan for licensing operators of vessels covered by the Act.

Plan For Licensing Operators of Fishing Industry Vessels

Within two years of the enactment of the Act, the Secretary of Transportation in consultation with the Commercial Fishing Industry Vessel Advisory Committee will prepare and submit to Congress a plan for the licensing of operators of documented fishing, fish processing, and fish tender vessels.

Casualty and Vessel Inspection Studies

The Secretary in cooperation with the insurance industry is required to compile statistics concerning marine casualties and to develop a statistical base for analyzing vessel risks.

In addition, a study of the safety problems on fishing industry vessels must be submitted to Congress before January 1, 1990.

Fishing Agreements

The Act contains a new provision which requires a fishing agreement between the masters or individuals in charge of a fishing vessel and each seaman employed on board when the vessel is at least 20 gross tons and on a voyage from a port in the U.S. The vessel is made liable *in rem* for the wages and shares of fish belonging to the seamen. Additionally, seamen are to notify the master of the vessel of any illness or disability within 7 days of the beginning of such illness or disability.

Transitional Provision For Foreign Built Processing Vessels

The Act provides a transitional period for foreign built fish processing vessels. These vessels are deemed to be in compliance with the Act until July 28, 1990 if they have an unexpired certificate of inspection issued by a foreign country that is part of an international convention for the safety of life at sea to which the U.S. government is a party and is in compliance with the safety regulations of that foreign country.

CONCLUSION

The Commercial Industry Fishing Vessel Safety Act of 1988 significantly increases the kinds of safety and survival gear required on commercial fishing vessels. Other prominent changes brought about by the Act include the addition of 46 U.S.C. §106 (1988) providing for the creation and enforcement of agreements between seamen and vessel masters and making the vessel liable *in rem* for wages and shares of fish as called for by the agreement; the creation of the Commercial Fishing Industry Vessel Advisory Committee; the requirement for the Secretary of Transportation to submit a plan for the licensing of operators of documented vessels; and the compilation of marine casualty statistics by the Secretary in cooperation with the insurance industry.

Al Earls

LAGNIAPPE
(A LITTLE SOMETHING EXTRA)

The National Wetland Policy Forum's recommended goal of "no overall net loss" of the nation's wetlands is one of the major principles that has been incorporated into the Environment Protection Agency's new "wetlands action plan." EPA's new program strives to restore and create wetlands and to increase their quality. In addition to the overall goal, the EPA plan also adopts several other of the forum's recommendations: (1) a wetlands planning initiative; (2) increased state and local role in wetlands protection; (3) changes in regulatory programming; (4) improved enforcement; (5) increase in education and information; (6) restoration; and, (7) evaluation of the cumulative effects of wetlands loss.

Alabama's Coastal Resources Advisory Committee has recommended that companies drilling for natural gas be allowed to discharge drilling rig cuttings and fluids directly into state coastal waters other than Mobile Bay. However, the oil and gas companies should share the cost of monitoring the impact of allowing such discharges. According to the committee, the companies currently take into consideration the cost of transporting drilling cuttings and fluids to shore in their original lease bid. The committee recommended that instead the lease holders discharge directly into the water and place the transportation savings into an escrow account. The interest derived from this account would be divided between the lease holder and the state, which would establish a monitoring program with its portion. While the Alabama Coastal Resources Advisory Committee does not have the authority to adopt rules, its recommendations have a strong impact on the decision-making of the state's Department of Environmental Management and Department of Economic and Community Affairs.

Legislation implementing many of the recommendations of the Mississippi Blue Ribbon Commission on Public Trust Tidelands has been approved by the State Senate and has been sent to the House. Senate Substitute Bill No. 2780 provides for the preparation of a preliminary map of public trust tidelands, authorizes the secretary of state to lease tidelands for a period not to exceed 40 years and creates a special public trust tideland fund, among other measures.

The U.S. Customs Service has relaxed its year-old "zero tolerance" program to combat drug smuggling (*See* WATER LOG Vol. 8, No. 3, at 24-27, July-Sept., 1988). Newly released interim guidelines call on Customs Service and Coast Guard personnel to merely issue a summons to commercial fishing vessels if a personal-use amount of drugs is found while the ship is engaged in fishing or en route to or from a fishing trip. In the past, federal agents were free to seize vessels if any amount of illegal drugs was found on board. Formal regulations are expected in March.