Issues in Ocean and Coastal Law and Policy

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University of Alabama
Marine Law Program

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Marine Pollution and Hazardous Waste Regulations

Before Congress can begin to deal with the problems of water pollution, it has to be able to point to some part of the Constitution which gives it authority to do so. That authority is found in the clause which gives Congress the power to regulate interstate commerce. Courts have interpreted that section of the Constitution to mean that Congress can regulate navigable waters. The term navigable waters has, in turn, been interpreted very broadly. The most recent amendments to the Federal Water Pollution Control Act (FWPCA) define navigable waters to mean "the waters of the United States, including the territorial seas." Federal courts have held that this means that the federal government has the authority to control pollution in any surface waters in the country. The constitutionality of this definition was upheld by a federal circuit court in United States v. Ashland Oil and Transportation Co.

There are two primary federal legislative tools for dealing with water pollution --the Rivers and Harbors Act of 1899 and the FWPCA.

Rivers and Harbors Act

The Rivers and Harbors Act (33 U.S.C. 403, 407, 411 (1970)) was passed in 1899 to protect the navigability of interstate waters. It contains an absolute ban on throwing "refuse" into navigable waters, or depositing refuse on river banks or beaches where it may be washed into navigable waters. An exception is made for sewage run-off.

Both the Rivers and Harbors Act and the FWPCA control the discharge of dredged or fill material into navigable waters. Section 407 of the Rivers and Harbors act prohibits the discharge of dredged or fill material unless the Sec-

retary of the Army issues a permit authorizing it. The basic purpose of this prohibition is to prevent the obstruction of navigation. In Zabel v. Tabb, the plaintiff desired to fill a portion of a navigable waterway for the purpose of setting up a trailer park. The Secretary of the Army denied him a permit to do so stating that plaintiff's land fill would have a harmful effect on the fish and wildlife resources of the area. Plaintiff sued arguing that the permit was wrongfully denied. Plaintiff's position was that the permit could be denied only if the fill would obstruct navigation and that the permit could not be denied for other reasons. The court held that the permit could be denied on conservation grounds. The discharge of dredged or fill material need not interfere with navigation. Such discharges can be prohibited for other reasons. The power of the Secretary of the Army to issue permits under section 407 was limited in Kalur v. Resor. In Kalur the court held that the Secretary could issue permits only when the discharge is to be made in navigable waters, and that he could not issue permits when the discharge is to be made into the non-navigable tributaries of navigable waters. The Kalur case also contains a good discussion of the concept of standing to sue and its importance to the plaintiff.

The FWPCA carries forth the prohibitions of section 407 of the Rivers and Harbors Act but established a new permit system. The permit system can be found in section 404 of the Clean Water Act of 1977. The Clean Water Act is an amendment to the FWPCA and the permit system provisions can also be found in 33 U.S. C.A. 1344 (Supp. 1978). The Secretary of the Army is given authority to issue "404 permits" for the discharge of dredged or fill material into specified disposal sites. The section empowers the Secretary to take conservation and other environmental factors into consideration when selecting disposal sites and in

deciding to issue or deny permits. The FWPCA expands the Secretary's authority to cover both navigable and non-navigable waters that flow into navigable waters. The discharge of dredged or fill material into any of the United States is illegal unless a "404 permit" has first been obtained.

In addition to the Rivers and Harbors Act and the FWPCA, the National Environmental Policy Act (42 U.S.C.A. 4321-4369 (Supp. 1978)) outlines national goals and policies relevant to the environment. It also has a substantive provision which requires that recommendations for federal legislation or building projects which affect the quality of the environment must contain a statement of the environmental impact of the proposed action.

Federal Water Pollution Control Act

Currently the domestic federal laws relating to oil spills can be found in the 1977 amendments to the FWPCA (33 U.S.C. Section 1321 (Supp. 1978)). One important thing to note is that the amendments change previous law to include any "hazardous" substances, as well as oil. The statute does not define what these substances are. It leaves that to the Department of the Interior. The basic scheme of the act is to get at the problem of oil and hazardous substance spills by making it economically unattractive to cause a spill. Spills are broken down into 3 categories: those that are unavoidable; those due to negligence; those that are wilfull. There is no liability under the act for spills in the first category. Those include 'acts of God', acts of war, or negligence of another party. In the case of spills due to relatively minor fault, such as negligence, the government is authorized to clean up the mess, and charge the persons causing the spill with clean up costs. If the spill is from a vessel, the maximum fine assessed for clean up costs is the greater of $250,000 or $150 per ton of the vessel. In the case of an on or offshore facility, the maximum is $50,000,000.

If the spill is wilfully caused, there is no limitation to the fine. Whatever the clean-up costs are, they must be paid by the pollutor.

As part of the enforcement of this provision, the Coast Guard is authorized to require a showing of financial responsibility of a vessel owner before the vessel enters or leaves a port. This section only applies to ships and barges weighing over 300 tone. Each owner must be able to show that they could pay $150 per ton of the ship, or $125,000, whichever is greater, if they cause a spill.

The act applies to all navigable waters of the U.S. including the territorial waters (the 3 mile belt owned by the states but whose navigability is controlled by the federal government), and the contiguous zone, that is, out to the 12 mile limit.

In addition the act makes clear that it is not intended to replace or foreclose private or public suits for damages to property caused by the spills. Indeed, since it is part of the FWPCA, private suits are permissable to enforce the section on oil pollution. For instance, in the case of Burgess v. Tamano, 370 f. Supp. 247 (D. Maine 1973), a tanker had run aground in the harbor of Portland, Maine, and spilled 100,000 gallons of oil, which caused damages to the clam digging industry. Although there were apparently violations of the oil pollution laws of the United States and Maine, the district court permitted an action by commercial clam diggers against the ship owners. This case is mentioned in a note in the annotations following Section 1321 in Title 33 U.S.C.A. Section 1321 (Supp. 1975). The case indicates that although the clams and fish injured "belong" to the state of Maine, there is a property right in the harvesting of those clams in commercial fishermen. They have suffered an individual harm.

In addition to fines assessed to compensate for clean-up costs, a vessel or facility owner or operator may be criminally liable for failing to report a spill.

However, one problem that has become apparent recently is that wilfull spills, such as those caused by tankers cleaning their bilges, are difficult to trace to a particular ship.

The FWPCA permits the U.S. to take more drastic measures to eliminate grave threats of pollution or other injury. For instance, a vessel may be removed, or if necessary, destroyed. This provision only applies to the territorial seas and contiguous waters. A different statute, passed in 1974 pursuant to a United Nations convention on oil spills on the high seas, allows the U.S. to take similar measures if the spill is not in U.S. waters, but does threaten to do damage in American waters (33 U.S.C.A. Section 1471-1487, 1976).

In addition to the indirect sanctions imposed on the oil industry to pay for clean up, the FWPCA (33 U.S.C. Section 1321 (j) (Supp. 1978)) gives authority to the Coast Guard to draw up and enforce regulations to ensure design safety in oil tankers and offshore oil facilities. These regulations, which apply to U.S. and foreign flag ships, can be found at 33 C.F.R. Section 155 (1978).

In a landmark decision, the U.S. Supreme Court on April 28, 1981, reversed a Seventh Circuit court of appeals decision and ruled that congress, in enacting the FWPCA precluded the development of a federal common law in the field of water pollution. City of Milwaukee v. Illinois, No. 79-408, reversed the lower court's ruling that Milwaukee's discharge of sewage into Lake Michigan constituted a public nuisance. This decision overturns a line of cases beginning with Illinois v. Milwaukee, a 1972 case, which held that the FWPCA was not the sole remedy available in water pollution cases.

The court stated that in enacting FWPCA, Congress preempted the field of regulation through establishment of a comprehensive regulatory program viewed as a complete restructuring of the existing water pollution legislation.

In a dissenting opinion, Justices Blackman, Marshall, and Stevens stated that the opinion made "a meaningless charade" of the original 1972 decision, Illinois v. Milwaukee, in which the court unanimously held that Illinois could bring a federal common-law action against the city of Milwaukee. The dissent argued that the 1981 City of Milwaukee decision fails to reflect the "unique role" federal common law plays in resolving disputes between one state and another, and further that the decision ignores the Court's past recognition that federal common law may complement congressional action in fulfillment of federal policies.

Marine Protection, Research, and Sanctuaries Act of 1972

EPA, acting under the Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. Section 1432 (1972), adopted ocean dumping regulations banning all sewage sludge dumping after December, 1981. In April, 1981, a federal judge ruled that the EPA had misconstrued the act in adopting those regulations. In City of New York v. EPA, 80-Civ-1677 (1981), the court held that the only sewage sludge dumping that is banned after December 31, 1981, is that which "unreasonably degrades the marine environment."

The opinion results from a lawsuit filed in 1980 by New York City against EPA. The suit alleged that EPA's ocean dumping criteria under the act were arbitrary and capricious because they failed to consider the impacts of ocean dumping and the costs of land-based alternatives in determining whether unreasonable harm would result.

EPA's interpretation of the City of New York opinion is that in the future, the EPA ocean dumping criteria should not serve as a complete impediment to

ocean dumping. EPA announced in late April, 1981, that in light of the court's decision, it was shifting its internal policy from one which "strongly discouraged" municipal ocean dumping to one which allows ocean dumping of certain sludges at specified ocean dumpsites.

Deepwater Port Act of 1974

Federal liability for oil discharges at or near deepwater ports is imposed by this act. A "deepwater port" is defined, in part, as "any fixed or floating man-made structures other than a vessel, or any group of such structures, located beyond the territorial sea and off the coast of the United States and which are used or intended for use as a port or terminal for loading or unloading and further handling of oil for transportation to any state,..."

The act prohibits oil discharged from a vessel within a safety zone established around a deepwater port, from a vessel that has received oil from another vessel at a deepwater port or from a deepwater port. It imposes penalties and liability for violations.

A deepwater port licensee's liability is unlimited, under certain circumstances, if the discharge of oil from the port or a vessel moored there is due to gross negligence or willful misconduct. In other instances, a licensee's liability is limited to $50 million.

The liability of the owner and operator of a vessel is also unlimited, under certain circumstances, for cleanup costs and damages resulting from a discharge of oil from a vessel within a deepwater port's safety zone or from a vessel that has received oil from another vessel at such a port. If the discharge was not due to gross negligence or willful misconduct, the liability is limited to the lesser of $150 per gross ton or $20 million.

The act established a Deepwater Port Liability Fund to compensate injured parties when cleanup costs and damages from a discharge exceed these liability limits or when the port licensee's owner or operator are exonerated from liability. A fee of 2 cents per barrel, collected from the owner of the oil when it is loaded or unloaded at a deepwater port, finances this fund.

Regulation of Toxic Substances and Waste

In 1978, the Carter Administration's Interagency Review Group on Disposal of Radioactive Waters published its findings. Among them was a listing of six possible technologies for disposal. One of them was "Placement in Deep Ocean Sediments." This discharge of radiological, chemical, or biological warfare agents, or high-level radioactive waste come under Section 307 of the FWPCA.

Solid waste comes under the Resource Conservation and Recovery Act of 1976. (Says waste is garbage, refuse, etc.) Solid waste includes hazardous waste. The act includes provisions for helping state and regional governments set up solid waste plans. It also provides for a recently-toughened permit system to transmit, store, or dispose of hazardous waste in the U.S. This should provide a vehicle for controlling the disposal of both kinds of waste at sea, a method used regularly in some areas.

Toxic Substances Control Act provides for federal testing of chemicals and chemical mixtures, including pesticides. Any such substance which seems to pose an unreasonable risk of injury to health or the environment may be regulated by EPA. The regulations may go so far as to prohibit the manufacture, processing, distribution in commerce, or disposal of such chemicals. This provides a mechanism for controlling or banning the disposal of such substances at sea.

II.

Ownership Conflicts in the Mississippi Sound

The Outer Continental Shelf Lands Act, 43 U.S.C. Sections 1331-1343 (1953), as implemented by 43 C.F.R. 3301.3 authorizes the Bureau of Land Mangagement of the United State's Department of the Interior to request nominations for possible oil and gas leases in the submerged lands claimed and managed by the United States. These requests for nominations are published in the Federal Register in the form of notices of tentative sales.

On September 13, 1978, notice of Tentative Sale No. 62 was published at 43 Federal Register 40933. Among the submerged lands subject to this proposed sale of leases are submerged lands located with reference to OCS official Protraction Diagram NH 16-4 Mobile. This diagram shows the submerged lands in the Gulf of Mexico lying adjacent to the states of Alabama and Mississippi claimed by the federal government. This diagram also shows the submerged lands considered by the federal government to be the property of the states of Alabama and Mississippi under the Submerged Lands Act, 43 U.S.C. Sections 1301-1315 (1953). All lands identified as submerged lands appertaining to the United States by OCS Diagram NH 16-4 Mobile are subject to the tentative sale. Among the lands so identified are four tracts of submerged lands that lie totally within the confines of the Mississippi Sound. Three of the tracts, one rather large and two relatively small, lie between Mississippi's lateral boundaries with Louisiana and Alabama. The fourth tract is divided into two portions by the lateral boundary between Mississippi and Alabama. The portion lying on the Alabama side of the lateral boundary is the larger of the two. These four tracts lie totally enclosed by submered lands which are indisputably the property of the states of Alabama and Mississippi. In fall, 1979, a lawsuit, U.S. v. Louisiana,

no. 9 original, was brought before the U.S. Supreme Court to determine ownership of these tracts. The University of Alabama's Marine Law Program is preparing an update of a monograph Federal and State Claims to Submerged Lands in the Mississippi Sound, (MASGP 79-008-1) first published in January, 1980, which analyzes the legal basis for the complicated litigation.

The Mississippi Sound is a narrow body of tidal water extending 70 miles from east to west along the southern shores of Alabama and Mississippi. It is bounded on the north by the mainland, on the east by Mobile Bay, on the west by Lake Borgne and on the south by a chain of islands running east to west from Mobile Bay to the St. Bernard Peninsula in Louisiana. The distance between the island chain and the mainland varies between 3 and 10 nautical miles. Offshore natural resources are within the jurisdiction of the Department of the Interior.

The Department of the Interior's rights and powers with respect to the natural resources of the continental shelf are governed by the Outer Continental Shelf Lands Act. In the Act Congress declared that it is

> "The policy of the United States that the subsoil and seabed of the Outer Continental Shelf appertain to the United States and power of disposition..."
> 42 U.S.C. Section 1332 (A).

The term "Outer Continental Shelf" includes "all submerged lands lying seaward and outside of the area of lands beneath navigable waters" assigned to the states by the Submerged Lands Act. 43 U.S.C. Section 1331 (A). The location of federally owned submerged lands is dependent upon the location of the states' seaward boundary and because of this the ownership of submerged lands in the continental shelf lying adjacent to the United States is determined by the location of the coastline.

In the Mississippi Sound, the Department of the Interior has used as the coastline the low water mark along the Alabama and Mississippi mainlands and the

low water mark around each of the islands lying at the mouth of the indentation. As previously noted these islands lie off the mainland shores at a distance of 3 to 10 geographical miles. Consequently when the three mile state seaward boundary lines are drawn within the confines of the Mississippi Sound there are areas in which these boundary lines overlap and areas in which they do not overlap. These enclaves are outside of Alabama's amd Mississippi's seaward boundaries and are thus considered to be subject to the jurisdiction and control of the United States.

The United States is asserting the power to lease the submerged lands lying within the federal enclaves in the Mississippi Sound by virtue of the Outer Continental Shelf Lands Act.

Conflicting federal and state claims to submerged lands have plagued this nation for over a century. In the early half of the nineteen hundreds the U.S. Supreme Court set forth a rule that seemed to settle the problem for all time, Pollard's Lessee v. Hagan, 3 How. 212, 11 L. Ed. 565 (1846). That rule provided that all lands underlying the navigable waters within the boundaries of a state are the property of that state. By the mid-20th century, however, Pollard seemed inadequate. Stronger federal control of the nation's coastal areas was deemed necessary. In 1947, the Supreme Court restricted the scope of the Pollard rule and declared that only those lands underlying inland waters belonged to the states and that those submerged lands lying seaward of the low water mark on our coasts and outside the limits of inland waters were subject to the paramount right of the United States to control and dispose of them. United States v. California, 332 U.S. 19, 67 S. Ct. 1658 (1947). Under the California rule no state had property rights in submerged lands lying seaward of the coastline. Motivated by a desire to settle the controversy for all time and a desire to restore to the states those lands that

were thought to be theirs under the Pollard rule, Congress then passed the Submerged Lands Act.

Coastline is defined by the Submerged Lands Act as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." In turn, "inland waters" is not defined under this act and the Supreme Court has held in U.S. v. California, 381 U.S. 139, 85 S. Ct. 1401 (1965) that the meaning of the term "inland waters" will be determined by the court on a case-by-case basis.

The Alabama and Mississippi boundary disputes are only the tip of a legal iceberg. The original lawsuit, filed 20 years ago, was entitled U.S. v. Louisiana, Texas, Mississippi, Alabama and Florida, 363 U.S. 1, 76, 80 S. Ct. 961, 1003 (1960). The basic question in all the submerged lands cases has been location of a state's coastline. The states have in these cases argued that the limited offshore tracts were located in "inland waters", and hence subject to state control under the Submerged lands Act. In the Louisiana boundary dispute, decided in 1969, the U.S. Supreme Court referred the question of the precise location of the state's coastlines to a special master. Through a series of compromises, a line was drawn, corresponding to Louisiana's boundary islands' ordinary low water mark and finding in favor of the state. This compromise was embodied in a supplemental decree issued by the Court in 1975.

Alabama and Mississippi are now undertaking the tedious "discovery" process of determining where their respective coastlines are legally located.

The state of Alabama has filed a motion for a supplementary decree from the Supreme Court which would decree that Alabama's coastline is the line of ordinary low water along the chain of barrier islands in the Mobile Bay and the Mississippi

Sound: Under the terms of this requested decree, the Mississippi Sound would be considered "inland waters." In support of its contentions, the state advances these arguments: that the Mississippi Sound has been termed "inland" on several maps issued by the U.S. Government in past years; that the Mississippi Sound is a historic bay by virtue of Alabama's continuous exertion of control over the Sound, and hence qualifies as "inland waters"; and that Mississippi Sound's ecological system is distinct from that of the Gulf of Mexico.

A master will be appointed in the Alabama case, and discovery should be completed by 1982. However, with the prospect of rich oil and gas finds off the Alabama coast, hopes for a speedy compromise to the coastline dispute grow increasingly dim. It seems inevitable that the "case-by-case" determination of states' coastlines will involve even more heated controversy in the future.

III.

Offshore Mineral Rights

Production of oil, gas, and minerals from submerged lands is assuming greater importance as the technology to exploit these resources becomes available. Such exploitation is regulated on three levels: international, national and state.

International Law

Convention on the Continental Shelf

This convention, accomplished at Geneva in 1958, was the first international agreement on rules for the exploration and exploitation of natural resources in those areas defined as the continental shelf. The convention went in force for the United States on June 10, 1964.

The term, "continental shelf" is defined broadly as "(a) the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial

sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

The convention gives the coastal nation exclusive sovereign rights over the continental shelf, subject to certain limitations to protect navigation, fishing and the conservation of living resources of the sea, "for the purpose of exploring it and exploiting its natural resources." This country exercises those rights under the Outer Continental Shelf Lands Act summarized above.

Convention on the Territorial Sea and the Contiguous Zone

Under this convention, also produced in Geneva in 1958 and effective as to the United States on September 10, 1964, a nation's sovereignty "extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea."

The Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. 5639, defines the territorial sea as "a belt of sea adjacent to (a coastal nation's) coast," without specifying the breadth of the belt. The Convention on the High Seas, 13 U.S.T.2312,T.I.A.S.5200, defines high seas as "all parts of the sea that are not included in the territorial sea or in the internal waters" of a coastal nation. The Convention on the Territorial Sea and the Contiguous zone, supra, defines the contiguous zone as a portion of the high seas which "may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured."

The convention provides that "the method of straight baselines joining app-

ropriate points" along a "deeply indented" coastline may be used in determining the breadth of the territorial sea, but restricts its use to certain geographical situations. The convention specifies that "the normal baseline...is the low water line...as marked on large-scale charts officially recognized by the coastal" nation.

In general, subject to qualifacations, the United States has claimed a 3-mile territorial sea, although now asserting a 200-mile fishery conservation zone.

Law of the Sea Treaty

The Reagan administration has blocked completion of the United Nations Law of the Sea (UNCLOS) Treaty, which has been in negotiation for seven years. At issue is the provision of the treaty related to deep sea mining. The question of reasonable access to seabed minerals has not been resolved. The present administration has stated that, as written, the treaty does not provide adequate assurance that private or national interests will be able to mine the deep seabed independent of the International Seabed Authority, an international agency established by the treaty to conduct seabed mining. The U.S. also finds unacceptable certain provisions that make technology transfer by seabed miners a likely condition of access to the deep seabed.

Federal Regulations

The Deep Seabed Hard Mineral Resources Act, 30 U.S.C. Sections 1401-1473 (1978), established an interim regulatory procedure for ocean mining activities conducted by U.S. nationals that will be superseded if and when a Law of the Sea enters into force for the United States. The administration of the

National Oceanic and Atmospheric Administration (NOAA) regulates mining activities and issues licences to engage in exploration and permits for commercial recovery of minerals. The administrator is required to determine whether the proposed activity will: unreasonably interfere with the freedom of the high seas of other states; conflict with any international obligation of the U.S.; breach international peace and serenity; have a significantly adverse effect on the quality of the environment; or pose an inordinate threat to the safety of life or property at sea.

In the Submerged Lands Act (43 U.S.C. 1301-1343 (1970)) the United States relinquished to the states its claims to the seabed and substratum of the territorial sea, while asserting ownership over the mineral resources of the outer continental shelf beyond that territorial sea:

> Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, (state lands)...all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed. (43 U.S.C. Section 1302 (1970)).

The Seaward extent of the territorial sea is 3 miles for all states except Texas and Florida which have approximately 10 miles of territorial sea. This three mile segment of the continental shelf is currently the site of most offshore oil in the United States. In 1970 only 10% of domestic production came from federal offshore lands, (Federal Environmental Law, p. 934), although development of that portion of the continental shelf is increasing rapidly. The case of United States v. Maine (420 U.S. 515, 95 S. Ct. 1155 (1975)) made it clear that mineral rights in the outer shelf belong to the United States. The question of who owns the rights to minerals and oil is important since leases

to private developers bring in large royalty revenues.

The Outer Continental Shelf Lands Act gives authority to the Department of the Interior to manage oil and mineral leases on federal offshore lands. (43 U.S.C. Section 1337 (1970)). The leases are awarded on the basis of competitive bidding. The maximum size of a leasehold is 5760 acres. The U.S. receives a cash bonus for each lease in addition to royalites when and if the lease becomes productive. The Secretary of Interior has delegated his authority over leasing in the Bureau of Land Management which maintains an Outer Continental Shelf Office in California and New Orleans.

The Coastal Zone Management Act of 1972 and 1976 (16 U.S.C. 1451) was designed to encourage states to develop coastal management programs such as that administered by the Coastal Area Board. Federal Funds are available for states which comply with CZMA. The 1976 amendments to this Act were designed to encourage new or additional oil and gas production from the Outer Continental Shelf.

The Rivers and Harbors Act of 1899, 33 U.S.C. Section 401 et seq., was intended to prevent obstruction to navigation. The U.S. Army Corps of Engineers administers the act by issuing permits for dredging and filling as well as for building any structure in the navigable waters in the United States. The Rivers and Harbors Act applies only when the structure, or modification of structure, directly affects a navigable water of the United States. The legal defination of "navigable water" includes waters navigable in law, (any water subject to ebb and flow of the tide), as well as all waters which are navigable in fact. Waters are considered "navigable in fact" if thay are presently used to transport foreign or interstate commerce, if they were used for that purpose in the past, or if they could be used for that purpose.

In California v. Sierra Club, 451 U.S. ____, 68 L.Ed. 2d 101, 101 S.Ct. 1775 (April, 1981), the U.S. Supreme Court held that the Rivers and Harbors Act does not permit suits by private parties to enforce the act. Applying the test of Cort v. Ash, 422 U.S. 66 (1975) to determine whether a private right of action exists under a given federal statute, the Court stated that the Rivers and Harbors Act contains only a general proscription of certain activities, and did not "focus" on any particular class of beneficiaries whose welfare Congress intended to further.

The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. Section 1251 et seq., prohibits the discharge of pollutants into the nation's waters. FWPCA jurisdiction is broad, including onshore and offshore facilities as well as vessels and extending oceanward to the U.S. contiguous zone as well as the territorial area. FWPCA provides for a system of permits to be administered by the Corps of Engineers to control the discharge of dredged or fill materials into navigable waters as well.

This act prohibits most discharges of oil into coastal waters and imposes criminal penalties for a discharger's failure to notify the federal government of a spill.

Under Section 404 of FWPCA, a permit from the Corps of Engineers is required for the discharge of any dredge or fill material into U.S. waters.

States have several means of preventing leases of federally owned submerged land; the Endangered Species Act, the Outer Continental Shelf Act, and until recently, the Coastal Zone Management Act.

The Coastal Zone Management Act required that federal activities be consistent with approved state coastal zone management progress. In the California v. Watt case concerning leasing in the Santa Maria Geological Basin, the court issued a preliminary injunction, concluding "that prelease activities...were intended to be subjected to the consistency requirements of the Coastal Zone Management Act."

12:6 Environmental Reporter 196 (1981). The oil industry, however, has been pushing for a policy in which outer continental shelf leasing is exempt from the consistency section. In July 1981, the National Oceanic and Atmospheric Administration (NOAA) issued a rule providing such an exemption.

Though initially the Endangered Species Act was an uncompromising protection of endangered species, a 1978 amendment allows exceptions to enforcement in the interest of important national objectives. So in effect, the CZMA exemption places the coastal states' total authority in the Outer Continental Shelf Lands Act provision that the Secretary must consider a state's recommentations on lease sales. Under the OCSLA, the Secretary of Interior can cancel a lease for environmental reasons, 43 U.S.C. 1334(a) (1), and the courts can countermand the Secretary's decision to lease lands only if that decision is illegal or a bitrary. Massachusetts v. Andrus, 594 F.2d at 892. In general terms, the effect of the new rule is to decrease the state's control over leases of federally owned submerged land.

State Regulation

Under the Reagan administration, increasing emphasis is being placed on "streamlining" rule-making and permitting processes affecting offshore resources. Consolidation of agency responsibility and coordination of permitting requirements is anticipated for many states, including Alabama.

Even a brief look at the present Alabama approach to mineral and oil leases gives an indication of how complex and variegated this field is. The first step in drilling for oil is to get a lease from the Department of Conservation. Ala. Code Section 9-15-18 and Section 9-17-62 (1975), both permit the director of the department to create oil and gas leases in state lands. More specifically, Section

9-17-60 permits leases of state lands under navigable waters. That section rather optimistically extends Alabama's right to create oil and gas leases 6 leagues (about 18 miles) into the Gulf of Mexico. That is approximately 5 leagues more than the Submerged Lands Act permits. The Department periodically makes state lands available for oil development to private parties who bid competitively for each tract. (Ala. Code Section 9-17-65 (1975)) Bids are taken separately on each tract, which can be a maximum of 5200 acres. The bid consists of three parts: a cash bonus paid outright for the lease; annual rent for the duration of the lease; and royalties representing a fixed percentage of the value of production. Each one of these items is open to bidding and the Department takes all three into account in determining which is the highest bid.

If a lease is awarded to a developer, that does not transfer the ownership of the land or even its minerals to the developer (lessee). It simply creates the right to enter on the land for the purpose of removing oil or gas. It usually lasts for a specific number of years, and then for so long as oil is produced on the leasehold.

Once the developer has an oil lease on specific property, he has to obtain a permit to drill from the Oil and Gas Board. The three member board, which has its offices in Tuscaloosa, is created by Ala. Code Section 9-17-3 (1975). The board is given extensive powers to control the production of oil and gas in Alabama. Besides issuing the initial drilling permit, it regulates the mechanics of how drilling takes place, how wells are closed, how waste waters are disposed of and even how much oil and gas can be produced. The purpose of these powers, and the regulations adopted pursuant to them are, among other goals, to promote safety and the conservation of oil and gas, and to prevent contamination of fresh wa-

ter. Before a driller can proceed he has to post bond with the board. If the well is abandoned or improperly capped the driller forfeits the bond. In addition, the board can fine the developer for violations.

Assuming the developer has a lease and a drilling permit, he must still obtain a dredging permit from the U.S. Corps of Engineers, (33 U.S.C. Section 419 (1970)).

The Coastal Area Board, Alabama Water Improvement Commission, Department of Conservation and Natural resources, and State Oil and Gas Board are attempting to coordinate regulatory and permitting activities in Mobile Bay with each other and with the federal agencies involved in oil and gas regulation. As part of a joint agency statement issued in July, 1981, a "state position" was adopted to reflect the agencies' regulatory policy. Important parts of this statement are:

1. That the prohibition against the discharge of any pollutants into the water, which is applicable to Mobile's exploration drilling program in Mobile Bay, should remain in effect for all exploratory drilling activities permitted in the coastal waters of Alabama;
2. That only the minimum number of drilling rigs that are absolutely necessary and can be justified by an applicant should be permitted;
3. That a continual monitoring program to measure and analyze the impact, if any, on the eco-system in Mobile Bay, Mississippi Sound and offshore waters of Alabama due to these increased exploration activities should be required.
4. Only the minimum number of production platforms and wells that are absolutely necessary and can be justified by an applicant should be permitted; and
5. A minimum number of transportation corridors, or pipeline routes, deemed absolutely necessary should be developed and utitlzed to bring production onshore.

Under this joint agency statement, a driller will obtain a permit from the Corps of Engineers. The permit must then be certified by Alabama Water Improvement Commission. The State Oil and Gas Board and the Department of Conservation will retain their respective requirements which must still be complied with under the new regulations.