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Mineral Law Program

A. L. Sage

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Mineral Law Program

A. L. Sage, III

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The Mississippi Mineral Resources Institute
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FINAL TECHINAL REPORT

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FINAL TECHINAL REPORT

The principal work under this grant is the publication of a mineral law newsletter. This newsletter is intended to fill a need in the area of mineral law in three states: Mississippi, Alabama, and Florida, and to a certain extent, Louisiana. There is, to the knowledge of the principal investigator, no similar publication in the three former states, and the one in Louisiana deals strictly with mineral law. The scope of the Mineral Law Update has been expanded to cover all areas of natural resources law material to the four states named. Thus, there is no comparable publication in any of the four states.

The principal investigator is a member of the Natural Resources Section of the Mississippi State Bar and chairman of the publications committee. It his intention to have the Natural Resources Law Update serve as the official publication of the Natural Resources Section, once any necessary official approval is obtained. It also his intention to expand the scope of the publication in all four geographic areas to include all subject matters in those areas, when feasible.

The principal investigator served on the Seminars Committee of the Natural Resources Section during the past year. The Committee has planned a natural resources seminar for October 6, 1989, and the principal investigator was responsible for the printing and distribution of the brochure advertising the seminar.

The program published one edition of the Mineral Law Update, the newsletter mentioned above. Publication of the newsletter

was hindered by a fire that displaced operations and disrupted communications with student-researchers. Publication should be on the planned schedule in the future. A copy of the newsletter is attached.

In addition to the work mentioned above, the principal investigator also prepared a proposal submitted as part of a larger proposal to the Mississippi Municipal Gas Authority, to research the legal problems and solutions involved in the work of the Authority. He also participated in discussions concerning the feasibility of a statewide or regional district waste management authority.

Mississippi Mineral Law Program

Mineral Law Update

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Review of 1989 Mississippi Environmental Legislation

by John Milner

The 1989 session of the Mississippi Legislature saw the passage of several important pieces of environmentally-related legislation but was also characterized by the failure of several proposals that had been approved by the State Environmental Protection Council (EPC). Composed of six senators and six representatives, the EPC was established during the 1988 legislative session to study and make recommendations pertaining to waste management and disposal needs of the state. *See* Miss Code Ann. §§ 49-29-1 through 49-29-9 (Supp. 1988). The Co-Chairmen of the EPC are Senator Dick Hall of Jackson and Representative Bruce Hanson of Columbus. The other EPC members are as follows:

House Members	Senate Members
Rep. Leslie King Washington County	Sen. Claude V. Bilbo, Jr. Jackson County
Rep. Joe Mitch McIlwain Tippah County	Sen. Marion (Buddy) Bond Attala County
Rep. Diane Peranich Harrison County	Sen. John T. Keeton, Jr. Grenada County
Rep. John Reeves Hinds County	Sen. William (Bill) Renick Marshall County
Rep. Jerry Wilkerson Kember County	Sen. Joseph T. 0oe) Stogner Marion County

in addition to governmental reorganization, which includes modifications to the Department of Natural Resources, the Legislature approved two measures endorsed by the EPC as part of its 1989 legislative program - (1) authorization of the EPC to produce a hazardous waste capacity assurance plan for the state, and (2) expansion and extension of the EPC's scope of work. However, the other three proposals in the EPC package did not pass—(1) a waste minimization program, (2) a comprehensive waste management trust fund, and (3) an infectious waste program.

We will first review the key elements of the bills that were enacted into law by the Legislature during the 1989 session and then discuss the EPC-sponsored measures that failed to gain passage.

I. Environmental Laws Enacted in the 1989 Legislative Session

A. Governmental.

1. *Mississippi Executive Reorganization Act of 1989*

Reference: 1989 Miss. Laws, Ch. 544
House Bill No. 659

Sponsor: Rep. Jim Simpson
Committee: Select Committee on Executive Branch Reorganization
Effective Date: July 1, 1989

Although the Mississippi Executive Reorganization Act of 1989 affected many state agencies, only its impact on the Department of Natural Resources (DNR) will be addressed here. Effective July 1, 1989, DNR will be renamed the Department of Environmental Quality (DEQ). The organizational structure of DNR will change only to the extent that DNR's Bureau of Parks and Recreation will be moved to the Department of Wildlife Conservation, which will be renamed the Department of Wildlife, Fisheries and Parks. The new DEQ will also receive the duties formerly performed by the Mississippi Energy and Transportation Board regarding nuclear-related activities within the state.

The administrative body which is vested with authority to promulgate and enforce regulations under which DNR operates, the Commission on Natural Resources, will receive a similar change of name to the Commission on Environmental Quality effective as of July 1. The Executive Director of the new DEQ will be appointed by the Governor and serve as his will and pleasure. This changes current law, which gives the Commission on Natural Resources the authority to appoint the Executive Director.

2. *Expansion of EPC's Scope of Work.*

Reference: 1989 Miss. Laws, Ch. 333
Senate Bill No. 2802
Sponsors: Senators Hall, Bilbo, Renick, Keeton, Bond and Stogner
Committees: Senate Environmental Protection Committee; House Conservation Committee
Effective Date: Date of Passage-April 8, 1989

NATURAL RESOURCES SEMINAR

The Natural Resources Section of the Mississippi State Bar is hosting a one day seminar on Friday, October 6,1989 in Jackson, MS on current environmental and natural resources issues in the areas of water, waste disposal and oil and gas operations. The seminar will be held at the Coliseum Ramda.

'John Milner is a partner in the Jackson law firm of Brunini, Grantham, Grower and Hewes and specializes in environmental law. He received his Bachelor of Arts and Juris Doctor degrees from the University of Mississippi.

The original statutory mandate of the EPC was to make recommendations to the Mississippi Legislature on three major issues: (1) the state's hazardous waste management and disposal needs, with emphasis on the state's responsibilities under Superfund Amendements and Reauthorization Act (SARA); (2) the state's non-hazardous waste management and disposal needs, with emphasis on the state's responsibilities under Subtitle D of the Resource Conservation and Recovery Act (RCRA), as amended; and (3) the state's hazardous materials management needs, with emphasis on hazardous materials transportation and the state's responsibilities under Title III of SARA, known as the Emergency Response and Community Righl-to-Know Act.

Chapter 333 increases EPC's scope to include study and recommendations for (1) the state's toxic waste management and disposal needs, with emphasis on the state's responsibilities under the Toxic Substance Control Act (TSCA), the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), and the Asbestos Hazard Emergency Response Act (AHERA); (2) the state's groundwater management needs, with emphasis on the state's responsibilities under the Safe Drinking Water Act (SDWA), and the Federal Water Pollution Control Act; (3) the state's air pollution control needs, with emphasis on the state's responsibilities under the Clean Air Act; and (4) expansion of authority for hazardous waste management and disposal needs to include Subtitle C of RCRA. The proposal also extends the statutory life of the EPC from January 31, 1990, to June 30, 1991, in order to provide the EPC sufficient time to adequately address these new issues.

B. Solid and Hazardous Wastes.

1. *Finalization of State's Capacity Assurance Plan for Hazardous Waste by EPC*

Reference: 1989 Miss. Laws, Ch. 476
Senate Bill No. 2790
Sponsors: Senators Dick Hall, Claude Bilbo, Buddy Bond, John Keeton, Bill Renick and Joe Stogner
Committees: Senate Environmental Protection, Conservation and Water Resources Committee; House Conservation and Water Resources Committee
Effective Date: July 1, 1989

Chapter 476 authorizes the EPC to finalize recommendations for the state hazardous waste capacity assurance plan (the "Capacity Assurance Plan") on behalf of the Mississippi Legislature and to submit the recommendations to the Governor for inclusion in the plan. A public hearing on the recommendations is required to be held prior to their submission to the Governor.

The Capacity Assurance Plan is required by §104(k) of the federal Superfund Amendments and Reauthorization Act (SARA). This section requires all states to provide the United States Environmental Protection Agency (USEPA) a plan which assures that a state will have adequate capacity to treat/dispose of hazardous substance generated in the state for the next twenty years. Failure to comply with these SARA requirements makes the State ineligible for federal Superfund remedial monies to finance cleanup of inactive sites in the state that contain hazardous substances. The Governor must submit the Capacity Assurance Plan to USEPA by October 17, 1989.

2. *Designation of DNR to Participate in Regional Waste Management Agreements.*

Reference: 1989 Miss. Laws, Ch. 552
Senate Bill No. 2052
Sponsor: Senator Hall
Committees: Senate Environmental Protection Committee; House Conservation Committee
Effective Date: July 1,1989

This chapter amends §49-17-13 to permit DNR to enter into an "interstate or regional agreement pertaining to solid or hazardous waste management." This authorization may be important to the state's hazardous waste capacity assurance plan discussed above. Through such regional agreements, Mississippi and other states may cooperate to utilize different methods of hazardous waste treatment/disposal already in existence in other states, such as incinerators and landfills, to handle any shortfall in Mississippi's capacity to deal with treatment/disposal of hazardous waste generated in the state. Such a cooperative agreement may obviate the need for construction of duplicative and costly treatment/disposal facilities in Mississippi. The apparent reason for the act was the fact that questions have been raised regarding the lack of specific authority of the Governor to bind the state to such an agreement which lasts beyond his term of office. This act resolves these questions by permitting a continuing agency, DNR, the authority to enter into these agreements.

1. *Authorization of DNR to Maintain a Field Office at Certain Hazardous Waste Facilities.*

Reference: 1989 Miss. Laws, Ch. 496
House Bill No. 146
Sponsor: Rep. Bruce Hanson
Committees: House Conservation Committee; Senate Envrionmental Protection Committee
Effective Date: July 1, 1989

Chapter 496 amends Miss. Code Ann. §17-17-15 (1972 & Supp. 1988), which mandates that DNR maintain a "permanent field office at any commercial hazardous waste landfill operating in this state. .. ."The bill limited the mandatory requirement for a field office to "any commercial off-site multi-user hazardous waste incinerator designed to incinerate multiple nonhomogeneous types of waste. ..." Thus for the mandatory maintenance of the field office to apply, the hazardous waste incinerator must be (1) in the business of hazardous waste disposal for profit, (2) not located on the site of an industrial facility, (3) in receipt of waste from more than one generator, and (4) designed to incinerate "multiple non-homogeneous types of waste. . . ." The apparent intent of this mandatory provision is to limit its application to the type of incinerator that does not presently exist in Mississippi-a commercial hazardous waste incinerator that accepts wastes from all customer sources. The cost of operating the field office at such an incinerator would be borne by the owner.

While the mandatory requirements for a field office were limited, the discretionary right of DNR to establish a field office was expanded from a "commercial hazardous waste landfill" to 'any treatment or disposal facility which receives hazardous waste directly or indirectly from more than (1) generator." In determining the need for a field office, DNR must consider, "at a minimum" (1) the type and amount of hazardous waste received and (2) the type of facility. A fee "in an amount not less than the actual operating expenses of the permanent field office" will be assessed by DNR.

The bill did not modify section 2 of the statute, which establishes a moratorium on permits for a commercial hazardous waste landfill until USEPA issues its final RCRA "land ban" regulations. An amendment to House Bill No. 146 that was adopted on the Senate floor required a five-year moratorium on the establishment of hazardous waste disposal facilities. However, this amendment was deleted in the bill's final version.

4. *Creation of County Cooperative Service Districts for Solid Waste Disposal and Other Matters.*

Reference: 1989 Miss. Laws, Ch. 519
Senate Bill No. 2822
Sponsors: Senators Ollie Mohamed, Bob Montgomery, Doug Anderson, Barbara Blanton, Wayne Burkes, Dick Hall, Alice Harden, Cy Rosenblatt, Rob Smith and Margaret Tate
Committees: Senate County Affairs and Finance Committee; House County Affairs and Ways and Means Committee
Effective Date: Date of Passage-April 4, 1989

One of the primary uses of this bill would be to create regional solid waste disposal districts. The bill would permit a regional district composed of county representatives to own and operate a solid waste disposal facility and then contract with municipalities within the counties for use of that

facility. This opportunity is particularly important in light of USEPA's proposed solid waste landfill regulations which will significantly increase landfill management costs. 5ee 53 Fed. Reg. 33314 (August 30, 1988).

From a more general perspective, the act authorizes the board of supervisors of any county to join with any other county or counties in the state to establish a county cooperative service district for apparently any lawful purpose related to the improvement of the delivery of services to, and the provision of benefits for, the citizens of the counties by joint financing, construction and administration of governmental services and facilities. The powers of the district, which would be a legal entity, will be vested in of a board of commissioners made up of five members appointed by the board *of* supervisors of each participating county. Municipalities within the counties do not have any representation on the board of commissioners.

The board of supervisors of each participating county is authorized to levy a tax up to one-half mill annually on all taxable property within the county to support the district. Any municipality within a district may enter into contracts with the district to obtain or receive any services provided by the district. Section 19-9-1 of the Mississippi Code, which authorizes the board of supervisors to issue negotiable bonds of the county, is amended to include authority for the issuance of bonds to defray the expenses of projects and services of the district, regardless of whether or not the particular district project is located in the county issuing the bonds.

5. *Underground Storage Tank (UST) Law Exemption for Electric Power Generating Plant USTs.*

Reference: 1989 Miss. Laws, Ch. 346
House Bill No. 384
Sponsor: Rep. Hanson
Committee: House Conservation Committee; Senate Environmental Protection Committee
Effective
Date: Date of Passage—March 12, 1989

Section 49-17MO3 of the Mississippi Code, which is the definition section of the Mississippi Underground Storage Tank Act, is amended to exempt motor fuels used in electric power generating plants for the commercial production of electricity from the definition of motor fuels in subsection (H) of that provision. The effect of this act is to eliminate the opportunity of commercial electric power generators which have underground storage tanks to utilize the groundwater protection trust fund when a tank leaks, requiring clean-up of motor fuels, such as gasoline. Such generators are not exempted from complying with the substantive requirements of the underground storage tank laws and regulations.

The trust fund was established to reimburse tank owners from clean-up costs and third party liability, primarily resulting from groundwater contamination. The fund pays for all clean-up costs up to $ 1 million and third party liability up to $1 million during a two-year grace period that ends in May, 1990. Thereafter, the fund pays for (1) clean-up costs up to $1 million above the first $100,000 and (2) third party liability up to $1 million after the first $300,000. The trust fund also serves the purpose of satisfying most of the financial assurance requirements of federal underground storage tank regulations.

6. *Anhydrous Ammonia Storage Plants.*

Reference: 1989 Miss. Laws, Ch. 302
House Bill No. 287
Sponsor: Rep. H, L. (Sonny) Meredith
Committees: House Municipalities Committee; Senate Municipalities Committee
Effective
Date: Date of Passage—February 16, 1989

This act provides that the installation of an anhydrous ammonia bulk storage plant in an industrial park or an industrial area serviced by a municipal fire department which is begun after February 1, 1989, must be approved by the municipality. Such plants constructed after February 1, 1989, must not be located within 200 feet of any residence, office, store or other regularly occupied building, except buildings occupied by the operator of the plant.

C. Public Trust Tidelands and Wetlands.

1. *Regulation of Public Trust Tidelands.*

Reference: 1989 Miss. Laws, Ch. 495
Senate Bill No. 2780
Sponsors: Senators Claude Bilbo, Stephen Hale, Margaret Tate, Clyde Woodfield and Thomas Collot
Committees: Senate Wildlife and Marine Resources and Public Property Committees; House Conservation and Ways and Means Committees
Effective
Date: Date of Passage-March 31, 1989

This chapter had its genesis in the 1988 landmark decision of the Missisippi Supreme Court in *Cinque Bambini Partnership v. State,* 491 So.2d 508 (Miss. 1986), which established that the State of Mississippi owns land submerged under inland rivers, streams, bayous and other waters that are subject to the ebb and flow of the tide to the extent of the mean high tide line, regardless of navigability. After the United States Supreme Court affirmed the *Cinque Bambini* decision in *Phillips Petroleum Company* v. *Mississippi,* 98 L.Ed.2d 877 (1988), the Secretary of State appointed a Blue Ribbon Committee to study and make recommendations regarding the mapping and management of the public trust tidelands. The Blue Ribbon Committee rendered its final report in January, 1989, and, based on the report, the Secretary of State promulgated regulations governing the tidelands mapping, leasing and related matters, which became effective on January 24, 1989.

a. *Provisions of the Act*

The act provides that the Secretary of State must prepare a Preliminary Map of Public Trust Tidelands, depicting (1) the boundary of the current mean high water line where the shoreline is undeveloped and (2) developed areas or where there have been encroachments, a "determinable" mean high water line "nearest the effective date of the Coastal Wetlands Protection Act." The bill states that the boundary of the public trust tidelands is "ambulatory"—that it will increase as the natural inland expansion of the tide increases, while natural accretion and natural reliction diminished the land subject to the public trust.

The Preliminary Map must be publicly posted by the chancery clerk of each of the coastal counties, together with a publication of its posting. A sixty (60) day period for comment on the Preliminary Map is provided. Within twenty (20) days after the end of (his period, the Secretary of State must have incorporated any revisions that he deems necessary as a result of the comments. The revised map must then be placed in the Secretary of State's permanent register for public inspection. This final certified map must be recorded in the offices of the Chancery Clerks of Hancock, Harrison and Jackson Counties. Upon recordation, the certified map is final as to all properties not subject to the trust. After publication of the certified map, as finally adopted, the Bureau of Marine Resources is directed to conduct a comprehensive program of tidelands boundary mapping. Additionally, the Secretary of State is required to issue all "consenting" property owners a certificate stating that their property is not subject to the public trust. These certificates must be filed with the chancery clerk of the county in which the land is located.

The Secretary of State is charged with determining those property owners who are in violation of the public trust boundary within one hundred twenty (120) days after the adoption of the final version of the Preliminary Map. They are to be served with notice that the boundaries set forth in the certified map will become final unless a contrary claim is made within three (3) years after the certified map becomes final. The property owners have six (6) months to negotiate and settle differences with the Secretary of State regarding the boundary, which period may be extended at the Secretary of State's discretion. If no boundary settlement can be obtained within the six-month period, then the state or persons claiming an interest in the property may apply to the chancery court of the county where the property is located for resolution of the dispute and a determination of the boundary.

The bill provides that public trust tidelands may be leased for forty (40) years and that a lessee may be given the option to renew the lease for an additional twenty-five (25) years. A Public Trust Tidelands Fund is created to receive lease rentals from public trust tidelands, except those from mineral leases. These funds may be used as follows:

(1) First to cover administrative costs incurred by the Secretary of State in administering the public trust tidelands;

(2) Secondly, remaining funds are to be disbursed pro rata to the local taxing authorities to replace lost ad valorem taxes; and

(3) Thirdly, any further remaining funds are to be disbursed to the Bureau of Marine Resources for tidelands management programs.

b. *Constitutionality Challenges.*

Although Chapter 495 went into effect on March 31, 1989, its constitutionality has been questioned by the Secretary of State with regard to provisions affecting the location of the public trust tidelands boundary. On behalf of the Secretary of State, the Attorney General filed a declaratory judgment action on June 5, 1989, in the Chancery Court of the First Judicial District of Hinds County, Mississippi, Cause No. 138,681, styled *Dick Molpus, Secretary of State v. State of Mississippi.*

Specifically, the action contests the constitutionality of Sections 1 and 5(1) of the act. Section 1 declares the resolution of current disputes regarding ownership of public trust tidelands to be consistent with the public purposes of the tidelands trust. These disputes primarily concern state ownership of filled and reclaimed tidelands in the coastal zone. The *Cinque Bambini* decision held that conveyances of trust lands must be consistent with the public purposes of the trust and authorized by the Legislature. The Secretary of State's position is that the loss of public trust tidelands due to "resolving disputes" that reduce the public trust ownership is inconsistent with the public purposes of the trust.

In conjunction with Section 1, Section 5(1) of the act provides that the public trust tidelands boundary in areas where there have been development or encroachments must be the determinable mean high water line nearest the effective date of the Coastal Wetlands Protection Law, which is July 1, 1973. *Cinque Bambini* confirms that tidelands ownership under the public trust was established when Mississippi entered the Union in 1817. Public trust tidelands have been filled in or reclaimed from 1817 to 1973 so that these tidelands are no longer subject to the ebb and flow of the tide. According to the Secretary of State, establishment of the public trust tidelands boundary as of 1973 acts as a de facto conveyance of the public trust tidelands filled and reclaimed prior to 1973. This 1973 boundary "constitutes a donation to the upland owner of artificially created tidelands." Thus, the Secretary of State concludes that he is "unable to implement this provision without violating the mandates of Section 95 of the Mississippi Constitution and the rulings of the Mississippi Supreme Court and the United States Supreme Court." Consequently, the Secretary of State takes the position that he "is unable to establish the boundary of the tidelands held in trust where there have been development and encroachments."

As relief, the Secretary of State requests the court to: (1) issue a declaratory judgment that Sections 1 and 5(1) of the act are unconstitutional; (2) order the Secretary of State to establish the boundary of public trust tidelands in accordance with *Cinque Bambini* and Section 95 of the Mississippi Constitution; (3) that the act is "null and void as being violative of the general laws governing trusts;" and (4) that the Secretary of State, as trustee, not be required to enforce provisions of the act that "deplete the trust or w'ould otherwise adversely affect the beneficiaries of the trust," but, instead, to "continue to enforce and manage the trust according to existing Mississippi law on the public trust."

The answer of the state of Mississippi, which is due on July 5, 1989, will be filed by the Attorney General's office on behalf of the state either through staff counsel in the Attorney General's office or through outside counsel appointed by the Attorney General.

In a current action concerning public trust tidelands, *William D. Byrd* v. *State of Mississipi, et al.,* No. 17,879 in the Chancery Court of the Second Judicial District of Harrison County, Mississippi, the plaintiff was recently granted the opportunity to amend his complaint to request declaratory relief that Chapter 495 is unconstitutional. An analogous case, *Andrew W. Cilich, Sr., et al.* v. *Mississippi State Highway Commission,* originating in the Chancery Court of the Second Judicial District of Harrison County, Mississippi, is currently on appeal by the Highway Commission to the Mississippi Supreme Court in Cause No. 59,605. The *Cilich* case does not involve the issue of Chapter 495's constitutionality, but does involve a dispute regarding ownership of public trust tidelands in the coastal zone.

2. *Mississippi Marine Litter Act of* 1989.

Reference: 1989 Miss. Laws, Ch. 475
Senate Bill No. 2675
Sponsor: Senator Thomas Gollott
Committees: Senate Environmental Protection Committee;
House Conservation Committee
Effective
Date: July 1, 1989

The Marine Litter Act makes it a misdemeanor to dispose of garbage in the "marine waters" of the state. Garbage includes "any type of plastics, including synthetic ropes, fishing nets, garbage bags and other garbage, including paper products, glass, metal, dunnage, lining and packing materials. . . ." The act applies to any person or "vessel," which is defined as "any boat, barge, or other vehicle operating in the marine environment from the largest supertanker to the smallest recreational craft."

To provide an alternative to unauthorized dumping in marine waters, the act requires the Commission on Wildlife Conservation to promulgate regulations to carry out the act, including requirements that all marinas and "all other access areas used by vessels" have proper disposal facilities. The Commission is directed to establish requirements for these disposal facilities. The Bureau of Marine Resources (BMR) has drafted proposed regulations for adoption by the Commission regarding the administration of the act. These proposed regulations will be noticed for public hearing for July 12, 1989, at 7:00 P.M. in the Marine Education Center in Biloxi, Mississippi.

These BMR regulations include a definition for "marine waters," which is the operative term describing the geographic jurisdiction of the act, as "any waters influenced by the ebb and flow of the tide and includes all rivers, streams, bayous, sounds and waters extending three miles south of the Barrier Islands within the state *of* Mississippi. Thus, the inland reach of the act's jurisdiction is intended to coincide with the stale's public trust ownership.

The misdemeanor penalty for a first violation is a maximum of $500, with each day of a continuing violation constituting a separate violation. Second and subsequent violations carry a maximum of a $10,000.00 fine or revocation of boating licenses, or both.

3. *Clarification of Liability Under the Mississippi Coastal Wetlands Protection Law.*

Reference: 1989 Miss. Laws, Ch. 420
Senate Bill No. 2501
Sponsor: Senator Hale
Committees: Senate Environmental Protection Committee;
House Conservation Committee
Effective
Date: July 1, 1989

The purpose of Chapter 420 was to amend §49-27-55 to provide that any person who "performs or causes to be performed any activity regulated by this chapter for which a permit has not been obtained, violates any provision of this chapter, regulation promulgated pursuant to this chapter or any condition of a permit," is liable to the state for the restoration of the affected coastal wetlands to their condition prior to the violation and for all damages to the wetlands. Previously, the section assessed liability for such restoration only to any person "who violates the provisions of this chapter."

4. *Dredging Projects in Existing Channels to be Permitted Through Normal Permitting Process.*

Reference: 1989 Miss. Laws, Ch. 331
Senate Bill No. 2698
Sponsor: Senator Hale
Committees: Senate Environmental Protection Committee;
House Conservation Committee

Effective
Date: July 1, 1989

Section 49-27-11 is amended by this act to require that dredging projects in existing channels for navigational purposes be permitted through the normal application and permit procedures provided in this section. Before the amendment, §49-27-11 required only a showing that the channel was in existence (1) on the effective date of the Coastal Wetlands Protection Law, July 1, 1973, and (2) on the date the application was filed. The act also repeals §49-27-25, which allowed permits to dredge old channels to be issued without bond.

D. Financing.

1. *Issuance of Pollution Control Revolving Fund Bonds.*

Reference: 1989 Miss. Laws, Ch. 522
Senate Bill No. 2874
Sponsor: Senator Rick Lambert
Committees: Senate Finance Committee; House Ways and Means Committee
Effective
Date: Date of Passage-April 4, 1989

The act permits the issuance of bonds for the funding of the Mississippi Pollution Control Revolving Fund, which is established in Sections 49-17-81 through 49-17-87. The purpose of the Revolving Fund is to assist political subdivisions in the construction of water pollution abatement projects by loans and other financing methods.

The act establishes a joint legislative committee to provide oversight and review of all bond transactions. This committee is to be composed of three members of the House appointed by the Speaker (one from each Supreme Court district) and three members of the Senate appointed by the President of the Senate (also one from each Supreme Court district).

2. Waste *Water Facility Bond Exemption.*

Reference: 1989 Miss. Laws, Ch. 516
Senate Bill No. 2592
Sponsor: Senator Jack Cordon
Committees: Senate Municipalities and Finance Committee; House Ways and Means Committee
Effective
Date: Date of Passage-April 4, 1989

This act provides that, until July 1, 1991, all bonds issued by a municipality *for* the purpose of constructing, replacing, renovating or improving waste water collection and treatment facilities to comply with administrative orders of the Commission on Natural Resources issued pursuant to the federal Water Pollution Control Act be exempt from the limitations of the Uniform Municipal Bond Law. This exemption remains in effect as long as (1) the principal and interest on the bonds is substantially paid for by the users of the facilities and (2) the rates for the usage are increased to the extent necessary to provide sufficient funds for the payment of the principal and interest on the bonds as they become due and payable.

E. Asbestos.

1. *Asbestos Abatement Accreditation and Certification Act.*

Reference: 1989 Miss. Laws, Ch. 505
House Bill No. 1260
Sponsors; Reps. Hanson and Simpson
Committees: House Conservation Committee; Senate Environmental Protection Committee
Effective
Date: From and after passage (April 4, 1989) except Sections 6 through 11, concerning certification of asbestos abatement personnel, which take effect on April 1, 1990

This act provides for accreditation and certification of asbestos abatement personnel in the following categories: (1) inspectors, (2) management planners, (3) project designers, (4) contractors, (5) supervisors, and (6) workers. Contractors, supervisors and workers are those categories of personnel who actually are involved in the physical removal or other abatement of the asbestos from a building. Inspectors are persons who inspect for the presence of asbestos, including the collection of samples of asbestos material, and provide written assessments of this asbestos content prior to the removal or other abatement of the asbestos. Management planners prepare written plans that evaluate the asbestos content in a building and recommend methods of abatement. Project designers specify engineering methods and work practices to be used during asbestos abatement projects.

The accreditation and certification requirements under the act apply to asbestos abatement projects in (1) elementary and secondary schools, (2) all other public buildings and (3) commercial buildings. "Public buildings" are broadly defined as "any building owned by the slate, counties, municipalities, institutions of higher learning, community college and any political subdivision." The definition of "commercial building" is also quite expansive, and includes any private building (1) in which the public is invited or allowed or (2) located such that conduct of any asbestos abatement activities therein would reasonably expose any person or persons to asbestos hazards. The only exception to the definition of a commercial building is that it "shall not include any residents." It is expected that DNR, the regulatory agency under the act, will promulgate regulations further specifying the definition of commercial buildings.

One of the primary factors in the passage of the act is the federal Asbestos Hazard Emergency Response Act (AHERA) which governs asbestos abatement in elementary and secondary schools. Regulations promulgated under AHERA require accreditation of asbestos abatement personnel in the same categories used in Chapter 505. These AHERA regulations require states to adopt accreditation training standards for abatement personnel that are as stringent as a "Model Accreditation Plan," which is included in the regulations. See 40 C.F.R. Párt 763, Subpart E, Appendix C, Section I.

AHERA and its regulations require that asbestos abatement work be initiated in all elementary and secondary schools on or before July 9, 1989, and that this abatement activity be completed within a reasonable time thereafter. There is no comparable statutory mandate for asbestos abatement in public or commercial buildings, although Congress may shortly enact legislation requiring asbestos abatement in public buildings. Therefore, as to public buildings (other than elementary and secondary schools) and commercial buildings, the act requires that certified and accredited abatement personnel be used in an abatement project if the building owner voluntarily decides to undertake such a project. In contrast, in elementary and secondary schools, AHERA mandates abatement of asbestos and also requires that accredited personnel be used in accomplishing the abatement.

The Commission on Natural Resources has responsibility to enact regulations by January 1, 1990, governing the required accreditation and certification of asbestos abatement personnel. The regulations must include an accreditation plan setting forth requirements for training courses for abatement personnel that will be equivalent to the federal Model Accreditation Plan. The Board of Trustees of the Institutions of Higher Learning is authorized to designate a university to offer all such training courses and the board has so designated Mississippi State University ("MSU"). MSU was previously approved by USEPA to offer the training courses and has been conducting these courses for more than a year. The Commission is prohibited from approving any training courses offered in the state of Mississippi other than those offered at MSU. However, abatement personnel may meet their training requirements by completing any applicable USEPA-approved training courses whether they be conducted by MSU or at institutions outside of Mississippi.

The act also requires asbestos personnel to obtain, on or before April 1, 1990, certificates from the Bureau of Pollution Control to conduct abatement-related activities. There is no practical difference between "certificates" and "licenses." These certificates must be renewed on an annual basis. A fee, to be set by the Commission, will be charged for issuance and renewal of certificates. Without this certificate and payment of fees, abatement personnel cannot do asbestos abatement business in the state. The regulations program is intended to be primarily self-sustaining through the fees assessed to certificate holders.

In addition to the completion of applicable USEPA-approved training courses, at MSU or other USEPA-approved institutions, and payment of applicable fees, the act also contains educational, licensure and other requirements for some categories of asbestos abatement personnel. These are as follows:

Category	Education	Licenses	Other Special Requirements
Management Planner and Project Designer	B.S. degree in engineering or architecture (or their equivalents) from an accredited university	Professional engineer or architect licensed in Mississippi (renewed annually)	None
Contractor, Supervisor and Inspector	High School diploma (or equivalent)	None	None
Worker	None	None	Physical examination by a physician licensed in Mississippi approving work on asbestos abatement project (renewed annually)

Performance of asbestos abatement work without a license or any other violation of the act or its rules or regulations may subject the violator to civil penalties, a reprimand, or suspension or revocation of the license, criminal misdemeanor penalties, or injunctive relief. The civil penalties may total a maximum of $25,000 for each violation. Criminal penalties for willful violations may be assessed up to the maximum of $100 per violation each day of such a willful violation as a separate offense.

II. **Significant Environmental Bills Not Passed by the Legislature**

A. Waste *Minimization Program.*

Reference: Senate Bill No. 2672

Sponsors: Senators Hall, Bilbo, Bond, Keeton, Renick and Stogner

Committees: Senate Environmental Protection Committee; House Conservation and Appropriations Committees

This bill would have created a Mississippi Comprehensive Multi-Media Waste Minimization Program to (1) compile and distribute information on waste minimization technologies and procedures, (2) administer grant and loan programs to subsidize the cost of waste minimization, (3) provide funds for waste minimization demonstration programs and (4) provide technical assistance regarding waste minimization, among other related purposes. The bill failed at the end of the 1989 session when the conference report was not adopted by both houses on or before the March 31,1989, deadline.

DNR would have been required to complete a comprehensive study of the current status of waste minimization activities in Mississippi. Mandatory programs for state agencies, the judicial branch and state institutions of higher learning are provided for (1) recycling of at least aluminum, high grade office paper and corrugated paper, and (2) solid waste minimization.

The Conference Report incorporated the central House committee amendments, which eliminated the mandatory program for state agencies, the judicial branch and state institutions of higher learning to enact recycling of at least aluminum, high-grade office paper and corrugated paer and solid waste management programs.

B. Infectious Waste Program.

Reference: House Bill No. 739

Sponsors: Reps. Hanson, Leslie King, Joe McIlwain, Diane Peranich, John Reeves and Jerry Wilkerson

Committee: House Conservation and Water Resources Committee; Senate Environmental Protection Committee

This bill proposed the expansion of the State Health Departments regulatory authority to include all producers of infectious waste, exclusive of private homes. The legislative proposal specifically required the Health Department to promulgate a definition of infectious waste and provided it the authority to regulate producers of infectious waste within the confines of the producer facility, including the promulgation of regulations concerning the storage, containment and treatment of infectious waste. DNR was to have regulated producers outside the confines *of* the producer facility and would have been authorized to promulgate regulations concerning the transportation and disposal of infectious waste. Furthermore, the proposal provided for fees on infectious waste producers to pay for the expenses associated with infectious waste regulation.

C. Establishment of Comprehensive Waste Management Trust Fund.

Reference: Senate Bill No. 2697

Sponsors: Senators Hall, Bilbo, Bond, Keeton, Renick and Stogner

Committee: Senate Environmental Protection Committee

This bill proposed the establishment of the Mississippi Comprehensive Waste Management Trust Fund (Fund) and provided for administration of the Fund, revenues to be deposited in the Fund and expenditures from the Fund, which would have been used exclusively for environmental management issues. The proposal established advance disposal fees on tires, lead acid batteries, beverage containers and waste newsprint as revenue sources for the Fund. The EPC proposal report also stated that the DNR was requesting legislation levying an environmental management fee, in lieu of a hazardous waste generation fee and a permitting and compliance fee, which would also be deposited in the Fund.

CONCLUSION

Through the leadership of the Environmental Protection Council, key issues regarding environmental management are being publicly discussed and reduced to legislative proposals. This process will continue as the EPC tackles other elements of its statutory agenda in the 1990 and 1991 sessions. Integrally involved in this effort to deal with our state's environmental management problems are the Department of Natural Resources; the Governor's Special Assistant for Natural Resources, Michael Goff; EPC's Advisory Committee, chaired by Louis Fortenberry of Pascagoula; and a number of private groups with expertise and interest in environmental matters. Through the collective efforts of these groups and others, there is hope that Mississippi's environmental problems can be diminished and perhaps resolved in reasonable and practical ways for the benefit of all segments of our society.

Sierra Club v. Louisiana Department of Wildlife and Fisheries

519 So.2d 836 (La. App. 4 Cir. 1988)

Commission, as agency empowered to manage state waterbottoms, granted exclusive rights to private companies to extract shells, fossils, and other shell deposits in return for paying royalties to the state at a stated price per cubic yard. For decades, the Commission has contracted these dredging leases by negotiating directly with the companies without publicly advertising for bids from all interested parties. Public interest group sought action to invalidate three leases.

The 4th Circuit Court of Appeals of Louisiana concluded the commission must follow public bidding procedures before it grants the right to take fossil deposits from state owned waters, and such contracts involve mineral rights which must be leased through public bids, pursuant to L.S.A. R.S. 41:1211 et. seq.

Fuselier v. Estate of Peschier

525 So.2d 577 (La. App. 3 Cir. 1988)

Plaintiffs rather executed a mineral lease to Inexco Oil Co. granting right to explore for and produce oil and gas on a tract of land. The exploration produced a producing well, but plaintiffs father never received a royalty check. Plaintiff and two family members inherited the tract and began receiving royalty checks. In 1975 plaintiff sold the tract to Robert Spears, reserving the right to explore for and produce any minerals on the reconveyed tract. In 1976, plaintiff sold to defendant the mineral servitude reserved to himself in the Spears sale, burdened with the Inexco lease with a right of redemption for $112,000 within 5 years. Pursuant to this sale, Inexco began royalty payments to the defendant until his death in 1976 and then to his estate. On August 19, 1981, plaintiff timely exercised his right of redemption, and resumed receiving all royalty checks. Plaintiff filed this lawsuit to seek an accounting and refund of all royalty payments made to the defendant and his estate. Defendant filed motion for summary judgment which was granted. Plaintiff appealed.

The court determined the plaintiff created a mineral servitude when he reserved the minerals to himself in the sale of the land to Spears. The court concluded mineral royalties are civil fruits (see L.S.A.R.S. 31:123 LSA C.C. arts 495, 545), and the defendant, as vendee in a sale with a right of redemption, is entitled to keep until the right of redemption is exercised under L.S.C.C.C. arts 2575 and 2586. Plaintiff was not entitled to an accounting or refund of payments made to defendant's estate.

Sandefer Oil and Gas Inc. v. AIG Oil Rig of Texas

846 F.2d 319 (5th Cir. 1988)

Between 1980 and 1984, plaintiff, an oil and gas exploration company, obtained insurance policies for various oil field risks. The policies were obtained by the plaintiff's broker in Houston and were delivered to the plaintiff in Houston. In July of 1985, plaintiff submitted six claims under these policies. Three of the claims, which are the subject of the instant case, arose in Louisiana. The losses for which plaintiff sought coverage occurred in 1982 and 1983. The claims were denied for failure to give reasonably prompt notice of losses. Plaintiff contends the delay was excusable because it didn't know the losses were covered under the policies. The coverage sought was for underground blowouts or uncontrolled subsurface flows. The plaintiff contended that while it had knowledge of the subsurface blowouts, it was unaware of coverage and that it filed the proof of loss as soon as it was aware of coverage.

The district court granted defendants motion for summary judgement. The magistrate determined Texas law governed and barred recovery because of plaintiff's unreasonable delay in filing its proof of loss. The 5th Circuit affirmed the district court, holding under Louisiana conflict of law principles Texas insurance law was applicable to policies covering Louisiana oil wells in that Texas was the place of contracting, negotiation and performance of the policies. Also, under Texas law, lack of knowledge of specific coverage is, as a matter of law, not a valid excuse.

Burnett v. Perkins

523 So.2d 106 (Ala. 1988)

Plaintiffs, the Perkinses, filed a declaratory judgment action against Burnett seeking to quiet title in and to an undivided 3/32 interest in all minerals produced from a tract of land in Lamar county and a declaration that they were entitled to a pro-rata share of any royalty paid for oil and gas upon the drilling units of the described lands. The trial court entered a judgement for the Perkinses, holding they were entitled to the claimed royalty. The issues presented for review were (1) whether the deed executed by the Perkinses effectively reserved an undivided one-half of the royalty interest; (2) whether the grant of executive rights to Burnett included the right to pool royalty interest; and (3) whether by filing suit the Perkinses ratified the Burnett lease and thus became subject to the pooling instituted by lessee Alagasco, Inc.

In 1978, the grantors conveyed to Burnett a tract of approximately 60 acres, and in the deed contained the following reservation: 'The grantors hereby reserve unto themselves, and during their joint lives, and on the death of either of them, to the survivor, until the death of the survivor, an undivided lá interest in and to any mineral royalty which might be derived from the actual drilling of an oil or gas well on the property...

This reservation of royalty is in no way to be construed as a limitation on the part of the grantees to lease said lands for mineral exploration..."

The grantees subsequently entered into an agreement to execute a mineral lease to Alagasco, in which the lease provided a pooling agreement and a one-eighth royalty payment in the event of production. The grantees claimed the deed was valid only in the event of production and not the actual execution of a lease.

The Alabama Supreme Court held: The deed of conveyance, taken as a whole, expressed the intent to reserve from the grant an interest in oil and gas underlying the conveyed tract, not simply an interest in oil and gas produced from wells located on the conveyed tract. Grantors ratified the mineral lease executed by grantees by filing this action seeking royalties from production under the lease, even if grantees did not have the power to pool grantors' reserved interest, and grantors accordingly were to receive royalties from the production under the lease.

Mississippi State Highway Commission v. New Albany Gas Systems

534 So.2d 204 (Miss. 1988)

The Mississippi State Highway Commission brought suit against the city of New Albany, seeking removal of a gas line attached to a bridge located on Highway 78. On a cross-motion for summary judgment, the Union County Chancery court held that the commission was estopped through laches from requiring the removal of the gas line unless it was willing to incur three-fourths of the cost. The Mississippi Supreme Court held that the statutes of limitation on adverse possession did not run against the state; (2) state could not be estopped by laches from requiring removal of gas pipeline; and (3) Commission has power to demand removal of natural gas pipeline at the expense of the city utility under statute and did not act arbitrarily or capriciously in requiring removal.

Matter of McGowan

533 So.2d 999 (La. App. 1 Cir. 1988)

The Louisiana Department of Environmental Quality issued a compliance order to John W McGowan as owner and operator of the Devilbis, Kratzer, and Taylor production leases located in Roanoke Field of Jefferson Davis Parrish. The compliance order was issued for alleged violations of the environmental quality act on the sites, the discharge of oil field wastes,

and failure to notify DEQ of the discharges. Upon McGowan's request, an administrative hearing was held and the DEQ assessed penalties in the amount of $56,000, and review was sought. The Court of Appeals held that secretary's finding that salt water and oil were discharged in sufficient quantities to pollute the environment was supported by the record. The court also found that drainage ditches into which oil and salt water were discharged constituted "waters of the state" within the meaning of Environmental Quality Act, La R.S. 30:1096 of the Louisiana Water Control Law. The court also concluded the Secretary's imposition of the $56,000 dollar penalty was an abuse of discretion. After reviewing the record, the court concluded that the factors constituting the basis for the amount of the penalty were considered when the $5,000 penalty was assessed. The hearing itself appears to be the only basis for the $51,000 increase in penalty assessment. The court found this to be arbitrary, capricious, and an abuse of discretion. The order of the Secretary was amended to the $5,000 original penalty, with costs equally assessed to DEQ and appellant.

Garner v. Kent Excavation, Inc.

532 So.2d 1033 (Ala. Civ. App. 1988)

Garner, property owners, sued defendants for personal injury and property damage arising out of a blast detonated by Kent. Kent was awarded a contract to do excavation work in preparation of building interstate Highway 20. On October 5, 1984, one of Kent's blasts "blew out' sending a shower of debris onto Garner's property, hitting the Garners and their home and causing damage. Kent admitted liability on all counts, but contested the amount of damages due on each. The jury awarded $3,250 for personal injuries and $5,000 for property damage. The Garners contend the $5,000 property damage should be reversed, because of the trial judges charge to the jury incorrectly stated the law of damages. The Alabama Court of Appeals affirmed the trial court, stating in a trespass action for damages to real property, the proper measure of damages is the difference between fair market value *of* the property before the injury and the fair market value of the property after the injury.

Street v. Equitable Petroleum Corp.

532 So.2d 887 (La. App. 5 Cir. 1988)

Plaintiff is the owner of a fishing camp near Lafitte, Louisiana. Defendants are the owners of an oil well production facility (tank battery) which is located on state-owned marshlands, approximately one-half mile from plaintiff's camp. On June 16, 1982, a pipe cracked and oil began to spill into the bayou. On June 17, 1982, Exxon Corp, was notified of the spill and possible fire and began preparations for cleaning up the oil spill. The Coast Guard was notified pursuant to federal law and later fined the defendant $1,000 for a 30 barrel oil spill, with no implication of fault. The clean-up lasted six days, with oil reaching the plaintiffs campground causing damages. The trial court entered a judgment for the plaintiff, and the oil company appealed. The court of appeals held that the decision that the oil company was liable to adjoining property owners for damages caused by the oil spill was sufficiently supported by adjoining owner's testimony regarding damages, including owner's reasonable efforts to mitigate damages and lack of evidence that the oil spill was an act of God. Judgment was affirmed for $7,120.

St. Amant v. Glesby - Marks Corp.

532 So.2d 963 (La. App. 5 Cir. 1988)

Plaintiff, an employee of Seascope, Inc., filed suit for an injury to his right hand sustained during his course of employment while operating a hydrostatic well testing unit leased from the defendant. The defendant filed a third-party demand against Seascope and their insurance company in an attempt to enforce an indemnity clause in the lease contract. Seascope claimed that the Louisiana Oil Field Indemnity Act, LSA. R.S. 9:2780, nullified the indemnity agreement and successfully moved for summary judgement, dismissing the third party. The Court of Appeals affirmed, stating the Oil Field Indemnity Act nullified the provision in lease of hydrostatic well testing unit regardless of equal bargaining power of each party.

Cole v. Minor

518 So.2d 61 (Ala. 1987)

A complicated fact situation, which should be analyzed with detail. Simply put, heirs and successors-in-interest of grantor brought suit to construe a mineral rights reservation in a deed.

The circuit court awarded one-fourth interest to plaintiffs and one-fourth interest to the defendants, and the defendants appealed. The Supreme Court of Alabama held: (1) in an action to construe an unambiguous deed, actual knowledge of the grantee is not a factor to be considered; (2) evidence of constructive notice is not admissible in actions to construe an unambiguous deed; and (3) where warranty deed grantor expressly reserved a one-half interest in oil, gas and mineral rights, but third party held the other one-half interest, covenant of warranty required that the reserved interest yield to granted interest, and the grantee was entitled to grantor's one-half interest. The court concluded, that the appellants are the owners of one-half of all oil, gas, and other minerals and the appellees are entitled to no interest in the oil, gas and other minerals.

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