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## Lady Luck Smiles on Environmentalists in Mississippi

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# LADY LUCK SMILES ON ENVIRONMENTALISTS IN MISSISSIPPI

## FRIENDS OF THE EARTH V. UNITED STATES ARMY CORPS OF ENGINEERS

### I. Introduction

In *Friends of the Earth v. United States Army Corps of Engineers*,<sup>1</sup> the United States District Court of the District of Columbia granted the plaintiff's motion for summary judgment, citing the United States Army Corps of Engineers failed to adequately consider, direct, indirect and cumulative impacts of proposed casino projects in Mississippi. The court further concluded the proposed casino projects were "significant," and required preparation of an environmental impact statement.<sup>2</sup>

### II. Facts and Procedural History

In 1991, only two gaming vessels operated in the state of Mississippi.<sup>3</sup> Mississippi state law requires that gambling establishments be built on floating vessels. Ten years later, there are more than 14 casinos, built on large floating barges along the Mississippi coast.<sup>4</sup> Mississippi is now the nation's third largest gambling destination.<sup>5</sup> This boom in development and tourism prompted many environmentalists to voice concern regarding the inevitable harm this development would have on the fragile Mississippi coastline. In 1999, Friends of the Earth, Inc., and the Gulf Islands Conservancy filed suit against the United States Army Corps of Engineers (Corps), challenging three casino projects to be built along the Back Bay of Biloxi and the Bay St. Louis: Casino World, Circus Circus, and Royal D'Iberville. Casino World and Circus Circus were proposed for the relatively undeveloped Bay St. Louis, while Royal D'Iberville was proposed for the Back Bay of Bolixi, a more developed area.<sup>6</sup> Friends of the Earth, Inc. filed their complaint in the District of Columbia Federal Circuit because their headquarters, and Corps headquarters were located in the District. The three casinos filed as defendant-intervenors. According to the plaintiffs, the Corps issued permits for all three casinos without performing

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<sup>1</sup> *Friends of the Earth, Inc., v. United States Army Corps of Engineers*, 109 F. Supp. 2d 30 (D.D.C. 2000).

<sup>2</sup> *Id.* at 42.

<sup>3</sup> Patrick Peterson, *Group Wants Unity To Be The Blueprint For Dealing With The Environmental Pressure Of Development*, THE SUN HERALD.com, September 8, 2000.

<sup>4</sup> *Friends of the Earth, Inc.*, 109 F. Supp. 2d 30, at 32 (D.D.C. 2000).

<sup>5</sup> See Peterson, *supra* n. 3.

<sup>6</sup> *Friends of the Earth, Inc.*, 109 F. Supp. 2d 30, 32 (D.D.C. 2000).

environmental impact statements (EIS).<sup>7</sup> All the parties filed motions for summary judgment.

In 1969, the United States Congress passed the National Environmental Policy Act (NEPA).<sup>8</sup> In passing NEPA, “Congress declared a ‘broad national commitment to protecting and promoting environmental quality.’”<sup>9</sup> NEPA required federal agencies to take a “hard look at environmental consequences” by assessing the environmental impacts of any “major federal action.”<sup>10</sup> The two aims of this “hard look” requirement are to “place upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action” and to “inform the public that [the agency] has indeed considered environmental concerns in the decision making process.”<sup>11</sup>

Founded in 1775, the Corps was charged with building dams, floodways, and battlefield fortifications.<sup>12</sup> In the mid-1970's, Congress gave the Corps a changing role, focusing more on the environment with the passage of the Clean Water Act.<sup>13</sup> When a proposed construction project is to be built on navigable waters, developers are required to file with the Corps for a permit. The Corps is then required to assess the damage, if any, to the surrounding environment by conducting an environmental assessment (EA). Under NEPA, if granting a permit constitutes a “major federal action significantly affecting the quality of the human environment,” the Corps is required to conduct a more intensive study of the situation by producing an environmental impact statement (EIS).<sup>14</sup> The Corps undertook an EA for each of the three proposed casino projects. In each case, the Corps made a “finding of no significant impact” (FONSI), and determined that no EIS was necessary.<sup>15</sup>

In May of 1996, the Hancock County Port and Harbor Commission submitted an application for a permit which it later transferred to the Casino World Project.<sup>16</sup> The permit application described two 600 foot long barges, a floating gazebo with a 150 foot diameter, and an elevated access road, which would encompass 4.8 acres

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<sup>7</sup> Stewart Yerton, *Judge Voids Three Mississippi Casino Permits-Corps Didn't Study Their Effect on the Coast*, THE NEW ORLEANS TIMES-PICAYUNE, August 11, 2000.

<sup>8</sup> 42 U.S.C.S. § 4321 *et seq.*

<sup>9</sup> *Friends of the Earth, Inc.*, 109 F. Supp 2d 30, 32 (D.D.C. 2000) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989)).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 32 (alteration in original)(quoting *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983)).

<sup>12</sup> Patrick Peterson, *Can Corps Accept A Role That's Evolving?*, THE SUN HERALD.com, September 17, 2000.

<sup>13</sup> 33 U.S.C. § 1344.

<sup>14</sup> *Friends of the Earth, Inc.*, at 33.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 33 n.3.

of water bottom.<sup>17</sup> Adjacent to the moored casino would be a development, including a 450-room hotel, tennis courts, a golf course, a parking garage, and a recreational vehicle park.<sup>18</sup>

On June 14, 1996, the Corps issued a public notice of the permit. Over the next two years, the Corps received numerous comments from federal and state agencies, suggesting the Corps prepare an EIS. All the agencies seemed to be concerned with the potential impact the Casino World development would have on the environment. Nevertheless, the Corps issued an EA, and subsequently, a FONSI. The Corps issued a permit on March 25, 1998.<sup>19</sup>

Similar actions occurred with the Circus Circus and the Royal D'Iberville casinos. Both of these casinos were also extensive projects, potentially impacting the marsh, tidal waters, wetlands, water quality, aquatic life, waterbottoms, and habitat. Once again, in both cases, federal and state agencies requested the Corps conduct an EIS.<sup>20</sup> In the case of Circus Circus, the Corps even recalled its own permit to perform further investigation, but subsequently issued an EA, a FONSI, and a permit, all on February 17, 1998.<sup>21</sup> In the case of the Royal D'Iberville casino, two federal agencies and a state agency specifically opposed the issuance of a permit without the preparation of an EIS. Once again, these agencies raised concerns regarding the impact this casino would have on its surrounding environment. Ignoring the agencies, the Corps issued a permit on October 7, 1998.<sup>22</sup>

During this period of investigation the Environmental Protection Agency and the Department of Interior expressed concern regarding the dramatic growth of casino development along the Mississippi coast to the Secretary of the Army. In response, the Deputy Assistant Secretary of the Army sent a memorandum on March 4, 1998 to the Army Corps of Engineers requiring them to suspend issuing permits for casino development in Hancock and Harrison Counties, pending the completion of a Programmatic Environmental Impact Statement.<sup>23</sup> The Corps ignored the orders and issued the permits.<sup>24</sup>

### III. Federal District Court's Analysis

Under the Administrative Procedure Act, "a reviewing court may only set aside

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<sup>17</sup> *Id.* at 33.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 34.

<sup>22</sup> *Id.* at 34.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

agency actions, findings or conclusions when they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>25</sup> The court noted an agency action is arbitrary and capricious if it has “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>26</sup> In other words, there would be a strong presumption in favor of the Corps, because the court would consider them “experts.”<sup>27</sup> The court, however would have some authority to review and determine whether the agency’s decisions were “based on consideration of the relevant factors and whether ‘...[there was]...’ a clear error of judgment.”<sup>28</sup> If the Corps “articulated a rational connection between the facts found and the choices made,” the court would have to give deference to the agency as the expert, and the decision would be upheld.<sup>29</sup>

The plaintiffs argued the Corps “failed to consider several aspects of the projects, and that to the extent the assessments did mention impacts, they were so conclusory, they did not constitute any real consideration.”<sup>30</sup> The plaintiffs specifically contended the Corps did not address three different types of impacts the casinos would have on the environment with any type of detail. The three types of impacts were direct impacts, indirect impacts, and cumulative impacts. Finally, the plaintiffs argued that the Corps was required to prepare an EIS because several characteristics of these projects made the environmental impacts of these projects “significant,” as within the NEPA regulations.<sup>31</sup> The court addressed each argument separately.

### A. Direct Impacts

Under the direct impacts argument there were seven different categories which the plaintiffs claimed the Corps failed to analyze. The plaintiffs argued an “agency’s analysis under NEPA must account for all direct environmental impacts of the proposed action.”<sup>32</sup> Most of the impacts appeared to be applicable to all three casino

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<sup>25</sup> *Id.* at 34 (citing 5 U.S.C. § 706 (2)(A)).

<sup>26</sup> *Id.* at 34 (quoting *Motor Vehicle Manufacturer Association v. State Farm Mutual*, 463 U.S. 29, 42 (1983)).

<sup>27</sup> *Id.*.

<sup>28</sup> *Id.* at 36 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 415-416 (1971)).

<sup>29</sup> *Id.* at 36 (quoting *Baltimore Gas and Electric Company v. Natural Resources Defense Council*, 462 U.S. at 105).

<sup>30</sup> *Id.* at 36..

<sup>31</sup> *See supra* n. 13.

<sup>32</sup> *Id.* (citing 40 C.F.R. § 1501.2; 40 C.F.R § 1508.8).

sites.

The first of the direct impacts evaluated by the court was dredging. The plaintiffs contended the Corps failed to “consider the impacts of dredging at Casino World even though such dredging was inevitable.”<sup>33</sup> According to Mississippi state law, a floating vessel must have a draft of at least six feet.<sup>34</sup> Casino World’s proposed location on the Bay St. Louis had an average 4.4 foot depth.<sup>35</sup> The Corps conceded that it failed to consider dredging in its EA for the Casino World permit, because Casino World did not mention dredging in their permit application. While the court admitted that it was “hard to fathom how Casino World will comply with the statutory requirements without dredging...” it concluded that the “Corps was not arbitrary and capricious in its evaluation of the issue.”<sup>36</sup>

The second direct impact issue the court evaluated focused on water quality. The plaintiffs contended the Corps failed to evaluate the “adverse impact” that casinos would have on the water quality of their proposed locations.<sup>37</sup> The court however, determined the Corps had in fact evaluated water quality in each EA. The Corps determined there was sufficient capacity at the water treatment plants in the area to accommodate casino waste water. The Court found this was a sufficient evaluation of water quality impacts.<sup>38</sup> The court determined even though the plaintiff may have been right with respect to the level of toxins in the water due to run off from the construction sites, it had to give deference to the Corps due to the expertise of the agency on such matters.<sup>39</sup>

The court’s evaluation of wetlands however, had a very different outcome. The federal court noted that the Fish and Wildlife Service (FWS) expressed concern that the impacts from the construction of Casino World would “...cause direct and secondary impacts from the runoff...” on forested wetlands.<sup>40</sup> Despite the outside agency’s concern, the Corps failed to even consider any runoff impact on wetlands when it conducted its EA for the permit. The court determined that “...the Corps never evaluated...the potential for wetlands to be degraded by their proximity to the projects. The Corps failed to take a ‘hard look’ at this relevant concern that was raised by commentators.”<sup>41</sup>

The court also determined the Corps had failed to conduct analysis regarding the

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<sup>33</sup> *Id.* at 36.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 37.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 375-78 (1989))

<sup>40</sup> *Id.* at 38.

<sup>41</sup> *Id.*

impact the proposed projects would have on the aquatic habitat. The plaintiffs argued dredging, and the actual location of the casinos would destroy waterbottoms.<sup>42</sup> The Corps argued the loss of productivity of the aquatic habitat was “insignificant.”<sup>43</sup> Most of the commenting federal agencies, however, noted the “value of these waterbottoms as habitat.”<sup>44</sup> Despite the Corps finding the casino barges would add to the diversity of the habitat, the court noted some of the evidence suggested that in fact, the waterbottom habitat would be destroyed. The court suggested the Corps should provide further analysis on this impact before it could conclude that the impact would be “insignificant.”<sup>45</sup>

The fifth impact evaluated by the court was the intake of larvae and eggs. The plaintiffs claimed the Corps did not consider that the design of the casino barge, which would essentially “sump,” or draw in larvae and eggs.<sup>46</sup> The Corps admitted it did not fully address this issue in the EA. It defended its actions by arguing this issue had not been discussed during the administrative process.<sup>47</sup> However, the FWS had clearly expressed its concern that a casino barge would act as a sump, and trap certain aquatic life underneath a barge.<sup>48</sup> The court contended this information should have been analyzed by the Corps, but gave no other ruling. Finally, on the last two impacts, aquifers and scouring, the court determined the Corps did evaluate both impacts. The court deferred to the Corps’ expertise and administrative decision making on both these issues.<sup>49</sup>

## B. Indirect Impacts

Per NEPA’s authorization, a court is also required to examine the indirect impacts of a federal action that has an impact on the environment. These indirect impacts are defined as “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”<sup>50</sup> According to the plaintiffs, the Corps’ own regulations required them to analyze the indirect impacts of a project when the “environmental consequences of the larger project are essentially products of the Corps permit action.”<sup>51</sup> The plaintiffs argued the Corps failed to analyze any

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 39.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 40 (quoting 40 C.F.R. § 1508.8 (b)).

<sup>51</sup> *Id.* (quoting 33 C.F.R. § 325 App. B § 7(b)).

upland impacts when it authorized the three permits for casino construction. For its part, the Corps responded by claiming they did not have to consider upland impacts.<sup>52</sup> The plaintiffs utilized an example provided in the Corps' regulations. They argued that if shipping terminals warrant analysis of upland impacts, then casinos do as well.<sup>53</sup> They further contended the same requirements in construction were necessary to build casinos.<sup>54</sup>

The court agreed with the plaintiffs, and found "development here [in this case] is akin to the shipping terminal example provided by the Corp's own regulations for which the scope of NEPA analysis was extended to upland development."<sup>55</sup> With the record before it, the court held that the Corps failed to take a hard look at the impacts.<sup>56</sup> The court also noted that "even more problematic" was the Corps' "total lack of analysis of the growth inducing effects of the casino projects."<sup>57</sup> The Corps argued the impact did not require analysis because it would be "highly speculative and indefinite."<sup>58</sup> Nevertheless, the court contended, "[o]n this issue, the Corps is simply wrong."<sup>59</sup> The court recognized developers of casinos had heralded the impending growth their casinos would attract. Moreover, the court noted Corps officials were aware of other federal agencies which were concerned with the level of growth in development of the Mississippi area.<sup>60</sup>

### C. Cumulative Impacts

Additionally, the court analyzed the plaintiffs argument that the Corps failed to consider the cumulative impacts of allowing more casinos on the Mississippi coast.<sup>61</sup> The court explained that because more than 20 casinos had been permitted, and 14 built along the Mississippi coast, there was, in fact, "significant controversy over their cumulative impact...."<sup>62</sup> The court concluded that while the Corps had reviewed the cumulative impacts in each of the EA's, "...the discussion provided no analysis at all."<sup>63</sup>

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<sup>52</sup> *Id.* at 40.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 41.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 42.



#### D. The Requirement of an EIS

Finally, the plaintiffs contended “an EIS [was] required under the statute and regulations because the impacts are significant by definition.”<sup>64</sup> The plaintiffs focused on two characteristics that would help determine if an impact was “significant,” and the court analyzed them specifically. The first was whether an action has impacts on “wetlands... or ecologically critical areas.”<sup>65</sup> Focusing on this characteristic, the court concluded Bay St. Louis met this characteristic because it is one of the “largest expanses of relatively undisturbed marsh within Mississippi.”<sup>66</sup> Accordingly, the court determined “St. Louis Bay therefore is an ecologically critical area, a characteristic that impels preparation of an EIS.”<sup>67</sup>

The second characteristic is “whether the effects on the environment are ‘highly controversial.’” The court determined the effects of an action are highly controversial when there is “a substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.”<sup>68</sup> The court noted three federal agencies and one state agency disputed the “Corps’ evaluation of the environmental impacts of the casinos, and pleaded with the Corps to prepare an EIS.”<sup>69</sup> There were also other pleas from the public, and the Corps’ own administration was aware these permits were “engendering considerable controversy.”<sup>70</sup> The court concluded that in fact, these casino permits were very controversial and met the standards of the second characteristic.

#### IV. Conclusion

The court concluded due to the overwhelming amount of evidence, the Corps was required to prepare an EIS before issuing permits to casinos.<sup>71</sup> The federal court concluded by stating the Corps had provided “less than a full picture” of the environmental consequences of the agency’s actions.<sup>72</sup> Esther Boykin, one of the attorneys who represented Friends of the Earth indicated the Federal Court’s opinion set some important precedent. Particularly, Boykin indicated the court’s ruling on the

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 43 (quoting from 40 C.F.R. § 1508.27).

<sup>66</sup> *Id.* at 43 (quoting a Corps EA).

<sup>67</sup> *Id.* at 43.

<sup>68</sup> *Id.* at 43 (alteration in original) (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9<sup>th</sup> Cir. 1998)).

<sup>69</sup> *Id.* at 43.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

“highly controversial” nature of the impacts was extremely important because there is little case law on this subject.<sup>73</sup> She further noted that while reports indicate that the Corps will not appeal the court’s decision, two of the defendant-interveners, Casino World and Royal D’Iberville, have already filed a notice of appeal.<sup>74</sup> It is unclear what effect this ruling will have on casino developers in Mississippi. While some experts conclude that the EIS will be the “kiss of death” for these casinos, it will be some time before there is any effect on current casino projects.<sup>75</sup> What is certain is all proposed construction on casinos in Mississippi will have to wait.

If affirmed in a higher court, there is a possibility that *Friends* could have some impact on South Carolina. Similar in many ways to the Mississippi coast, South Carolina’s own coast has some relatively pristine water ways, wetlands, and a diverse surrounding habitat. Currently, South Carolina opposes many forms of gaming. In 1999, the South Carolina General Assembly attempted to ban video poker beginning July 1, 2000, unless voters approved continued payout of video poker machines in a November 1999 referendum.<sup>76</sup> Joytime Distributors and Amusement Company, Inc., appealed to the South Carolina Supreme Court.<sup>77</sup> The South Carolina Supreme Court ruled that the General Assembly had violated the state’s constitution by delegating its decision making power to voters. Nevertheless, the state’s supreme court upheld the ban on video poker. As a result of *Joytime*, on July 1, 2000, South Carolina’s video poker came to an end.<sup>78</sup>

Notwithstanding, another form of gaming still exists in South Carolina: gambling cruises. These gambling boats, which leave from Little River, a small fishing port 23 miles north of Myrtle Beach, continue to make daily runs out to the Atlantic Ocean, where at the three mile international water zone, patrons can begin to gamble on the “floating casino.”<sup>79</sup> The casino boats arrived in Little River in late 1998 and early 1999, just as video poker became a hot issue in the legislature.<sup>80</sup> While there continues to be a great deal of controversy over these small casino boats, a bill in South Carolina’s legislature banning gambling cruises stalled for several

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<sup>73</sup> Interview with Esther Boykin, Attorney with Earth Justice Legal Defense Fund, in New Orleans, Louisiana (September 27, 2000).

<sup>74</sup> *Id.*

<sup>75</sup> Patrick Peterson, *Three Proposed Developments On Hold Until Effects On Environment Studied*, THE SUN HERALD.com, September 11, 2000.

<sup>76</sup> Richard Carelli, *Court Won’t Stop Video Poker Ban*, THE STATE, April 25, 2000, at B6.

<sup>77</sup> *Joytime Distributors and Amusement Co., Inc. v. State*, 528 S.E.2d 647 (S.C. 1999).

<sup>78</sup> *Id.*

<sup>79</sup> Henry Eichel, *Troubled Waters For Casino Boats They’re Still Legal Despite Legislative Efforts, But Boat Owners Say They Are Not Making Big Money*, THE STATE, July 16, 2000, at B1.

<sup>80</sup> *Id.*

years.<sup>81</sup>

The legislature's lack of action is good news for Carnival Cruise Lines. In 1999, the Miami-based cruise line offered four Charleston based cruises.<sup>82</sup> Other cruise lines are also venturing to Charleston. Eleven cruises were scheduled to leave from downtown Charleston, and 19 other cruise ships were scheduled to make port of call on the city.<sup>83</sup> The numbers for the years 2000 and 2001 were expected to increase. Most of these large cruise ships offer luxurious traveling accommodations and a choice of several casinos on board.

The large influx of maritime traffic is sure to have some impact on waterways and habitat in South Carolina. An interesting connection to consider between *Friends* and the current increase in casino boat gambling in South Carolina is how this increase in maritime traffic indirectly impacts the environment along the coast.<sup>84</sup> While the plaintiffs in *Friends* asked the court to equate floating casino barges to shipping terminals for purposes of determining indirect impacts, in South Carolina, terminals are frequently being used for the purposes of inviting gamblers on board. The clear difference however, is that the gambling takes place three miles off-shore in international shipping lanes. Currently, cities such as Charleston and Mount Pleasant have passed ordinances banning certain gambling cruises.<sup>85</sup> For its part, South Carolina's legislature will continue to wrestle with casino boat gambling. If it continues to grow, South Carolina's casino boat industry may run up against energized environmentalists. Environmentalists may get lucky and win once again.

*Darleene Michele Patrao Forsythe*

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<sup>81</sup> *Id.*

<sup>82</sup> John P. McDermott, *Cruise Activity Picks Up*, THE POST AND COURIER, May 23, 1999, at C1.

<sup>83</sup> *Id.*

<sup>84</sup> See *supra* nn. 52-56 (discussing Corp's shipping terminal regulations.)

<sup>85</sup> *Gambling Magnate's Boat Disappears As Ruling Handed Down*, THE STATE, May 5, 2000, at B3.