Volume 19, Number 3, 1999

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Clinton Extends U.S. Contiguous Zone

Administration Responds to Cabinet Ocean Report, Promises Action

Kristen M. Fletcher, J.D., LL.M.

On September 2, President Clinton signed a Presidential Proclamation formally extending the United States' contiguous zone from 12 nautical miles to 24, claiming jurisdiction of these near shore waters and doubling the area within which the Coast Guard and other federal authorities can enforce U.S. environmental, customs and immigrations laws at sea. (*See map, page 4; full Proclamation text, page 5.*)

The U.S. claims a 12-mile territorial sea and now claims a 24-mile contiguous zone. A nation's territorial sea is that area claimed as an extension of the mainland, with the coastal nation claiming jurisdiction over the resources and submerged lands and the right to enforcement in the area. The contiguous zone is an area beyond the territorial sea in which a nation may exercise more limited control such as that necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea.

The Proclamation, aimed at protecting the nation's coasts from pollution, drugs and illegal immi-

See Contiguous Zone, page 4

Court Approves Bay of St. Louis Casino

Concerned Citizens to Protect the Isles and Point, Inc., *et al.* v. Mississippi Gaming Commission, *et al.*, 735 So.2d 368 (Miss. 1999).

Brad Rath, 3L

In April, the Supreme Court of Mississippi affirmed lower court decisions to allow the construction of a casino complex on the north shore of the Bay of St. Louis in Harrison County. This site, the second attempt by the developer, was challenged by several citizen groups[1] that claimed the agency decisions leading to the permitted casino were arbitrary and capricious and that the permits were granted against state law. The Court deferred to the decisions of the state agencies responsible for siting and permitting in affirming the casino site and permits.

See Casino, page 7

In This Issue . . .

Circuits Split over Environmental Clean-up Costs

U.S. v. Hyndai Merchant Marine Co., 172 F.3d 1187 (9th Cir. 1999).

Kristen M. Fletcher, J.D., LL.M.

The Ninth Circuit U.S. Court of Appeals recently joined the Fifth Circuit in finding that governmental oversight costs of an environmental clean-up are properly charged to the party responsible for the damage. In *U.S. v. Hyndai Merchant Marine*, the Ninth Circuit affirmed a ruling holding Hyndai liable to the U.S. Coast Guard for its costs incurred in monitoring Hyndai's cleanup of fuel oil from a grounded ship in Alaska. Its ruling conflicts with a 1993 Third Circuit ruling finding that a governmental agency cannot shift its administrative costs, such as monitoring costs, to a regulated party without the congressional intent to delegate taxing power to the agency.

The *Hyndai* Grounding & Suit

The case arose from the 1991 grounding of the bulk carrier *M/V Hyndai No. 12* which ran aground in the Shumagin Islands of Alaska, an environmentally sensitive area approximately 260 miles west of Kodiak, while carrying close to 200,000 gallons of bunker oil in its bottom fuel tanks. The crew soon discovered that the ship's tanks were fractured and leaking oil, performed the containment procedures, and freed the ship at Hyndai's expense. During the containment, the Coast Guard stood ready with men and equipment to contain a possible major oil spill and monitored Hyndai's efforts to free the ship, consulting on and approving Hyndai's plan of operation.

The U.S. sued under the Oil Pollution Act (OPA)[1] to recover its costs from Hyndai for the Coast Guard's response to the emergency. The district court awarded the U.S. over $1.7 million and Hyndai, while recognizing its duty to reimburse for certain limited costs, appealed the award claiming that monitoring costs were not recoverable under the OPA which only provides for recovery of actual removal costs.

The court determined that the Coast Guard's activities were an attempt to "mitigate or prevent a substantial threat of a discharge"[2] and its monitoring was a means of "directing private actions to remove the discharge or to mitigate or prevent the threat of discharge of oil,"[3] as called for under the OPA. The court explained that "Hyndai's emphasis on actual removal unduly minimizes the importance of the Coast Guard's emergency stand-by operation, which qualifies as an act of 'prevention,' the cost of which is clearly recoverable under the terms of the definition as it applies to the liability imposed by § 2702."[4] It relied upon the sensitive circumstances of the spill, as well, stating that the "grounding of the *Hyndai No. 12* contained the seeds of a major ecological disaster. In the circumstances, it was only prudent for the government to rush personnel and equipment to the scene and maintain them there until the threat was over."[5]

The Circuit Split

Hyndai also challenged the assessment of Coast Guard monitoring costs on the basis of a 1974 Supreme Court decision, *National Cable Television Ass'n v. U.S.* (which established the NCTA doctrine), which "[reminds] Congress that it may not delegate away its taxing power to an executive agency."[6] Hyndai argued that the district court failed to ask whether the OPA allows a federal agency to shift its administrative costs,

Sea Grant

WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its goal is to increase awareness and understanding of coastal problems and issues.

To subscribe to WATER LOG free of charge, contact: Mississippi-Alabama Sea Grant Legal Program, 518 Law Center, University, MS, 38677, or contact us via e-mail at: waterlog@olemiss.edu . We welcome suggestions for topics you would like to see covered in WATER LOG.

Editor: Kristen M. Fletcher, J.D., LL.M.
Editor at Large: John A. Duff, J.D., LL.M.
Publication Design: Waurene Roberson
Policy Assistant: Brad Rath, 3L
Research Associates:
Tim Peeples, 3L Stacy Prewitt, 2L
Tammy L. Shaw, 3L Ginger Weston, 2L

For information about the Legal Program's research, ocean and coastal law, and/or back issues of WATER LOG, visit our homepage at
http://www.olemiss.edu/pubs/waterlog/

such as monitoring costs, to a regulated party. Under the NCTA doctrine, Congress' intent to delegate a taxing power to an executive agency must be unequivocal and Hyndai argued that the OPA does not provide for such a delegation. The Ninth Circuit quickly dismissed this argument by stating that the "OPA authorizes recovery of costs, not taxation,"[7] citing the Fifth Circuit holding that the NCTA doctrine does not apply to a CERCLA[8] clean up because a recovery of such clean up costs is neither a fee nor a tax.[9]

The Ninth and Fifth Circuit decisions conflict with a Third Circuit case[10] which applied the doctrine to a government suit for monitoring costs under the Resource Conservation and Recovery Act (RCRA),[11] finding that the government could *not* recover monitoring costs because "[n]owhere is there an explicit statement that Congress considers administrative and regulatory costs incurred overseeing the removal and remedial actions of a private party to be removal costs in and of themselves."[12] Finding this congressional omission significant, it denied governmental recovery.

Conclusion

The resulting split leaves questions regarding monitoring costs under OPA, RCRA, and CERCLA and other federal statutes that may call for environmental clean up. As a defendant, Hyndai argued that parties should be able to challenge the unreasonable and unnecessary administrative costs as a result of duplicative monitoring activities in environmental cases. The Ninth Circuit found the monitoring costs in the clean up of the *Hyndai* to be part of the "mitigation and prevention of a substantial threat of discharge of oil" that the Coast Guard is called upon under OPA to perform.[13] Federal agencies are now armed with the Ninth Circuit decision to argue that such monitoring activities are necessary costs of clean up and do not require specific congressional delegation to recover.

Endnotes

1. Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 - 2761 (1999).
2. 33 U.S.C. § 1321(c)(1)(B) (1999).
3. *Id.* at (A).
4. 172 F.3d at 1190.
5. *Id.* The court used this rationale to deny the argument that the monitoring costs were unnecessary and not recoverable under the OPA.
6. *National Cable Television Ass'n v. U.S.*, 415 U.S. 336, 342 (1974).
7. 172 F.3d at 1191.
8. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 - 9675 (1999).
9. *Id., citing United States v. Lowe*, 118 F.3d 399 (5th Cir. 1997).
10. *U.S. v. Rohm & Haas Co.*, 2 F.3d 1265 (1993).
11. 42. U.S.C. §§ 6901 - 6991 (1999).
12. *Id.* at 1275.
13. 33 U.S.C. § 1321(c)(1)(A) (1999).

Contiguous Zone from page 1

gration, doubles the area in which the Coast Guard and other federal authorities may board foreign vessels, advancing certain law enforcement and public health interests of the United States, as well as preventing the removal of cultural heritage found within 24 nautical miles of the U.S. coast.

The extension applies to U.S. states, the Commonwealth of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands. "With this new enforcement tool, we can better protect America's working families against drug trafficking, illegal immigration, and threats to our ocean environment," the Vice President said. "We are putting would-be smugglers and polluters on notice that we will do everything in our power to protect our waters and our shores."[1]

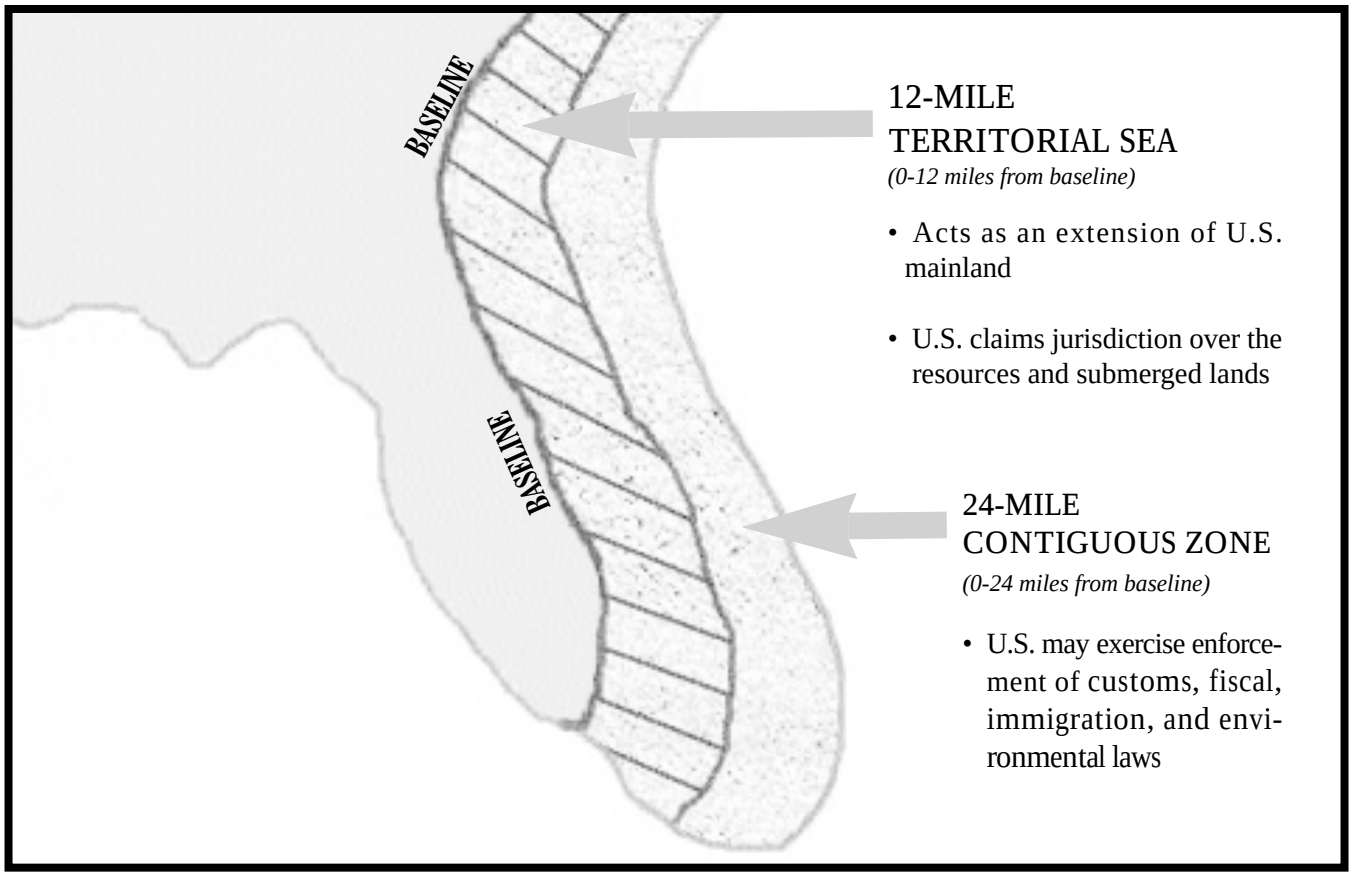
On the same day, Vice President Al Gore announced the formation of a high-level task force to oversee implementation of recommendations for strengthening federal ocean policy from the Cabinet report that President Clinton called for at the National Oceans Conference in 1998.[2] The report, entitled "Turning to the Sea: America's Ocean Future," outlines 148 recommendations in four areas: sustaining the economic benefits of the oceans, strengthening global security, protecting marine resources, and discovering the oceans. Key recommendations include: creating new incentives to reduce overfishing; working with the Senate to ensure that the U.S. joins the Law of the Sea Convention as soon as possible; coordinating federal programs with local "smart growth" efforts in coastal communities; and expanding federal support for underwater exploration.

The Oceans Report Task Force announced by the Vice President will include representatives of agencies with responsibility for ocean affairs, will set priorities for implementing key recommendations in the Cabinet's report and will meet quarterly to review progress.

The Cabinet report can be viewed on line at http://www.publicaffairs.noaa.gov.

Endnotes

1. Philip Shenon, *U.S. Doubles Offshore Zone Under its Law*, N.Y. TIMES, Sept. 3, 1999, at A13.
2. *See Clinton, Gore Call for Ocean Protection*, 18:3 WATER LOG 1 (1998).



Presidential Proclamation

The Contiguous Zone of the United States

President William J. Clinton
The White House Office of the Press Secretary, September 2, 1999

International law recognizes that coastal nations may establish zones contiguous to their territorial seas, known as contiguous zones.

The contiguous zone of the United States is a zone contiguous to the territorial sea of the United States, in which the United States may exercise the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea, and to punish infringement of the above laws and regulations committed within its territory or territorial sea.

Extension of the contiguous zone of the United States to the limits permitted by international law will advance the law enforcement and public health interests of the United States. Moreover, this extension is an important step in preventing the removal of cultural heritage found within 24 nautical miles of the baseline.

NOW, THEREFORE, I, WILLIAM J. CLINTON, by the authority vested in me as President by the Constitution of the United States, and in accordance with international law, do hereby proclaim the extension of the contiguous zone of the United States of America, including the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty, as follows:

The contiguous zone of the United States extends to 24 nautical miles from the baselines of the United States determined in accordance with international law, but in no case within the territorial sea of another nation.

In accordance with international law, reflected in the applicable provisions of the 1982 Convention on the Law of the Sea, within the contiguous zone of the United States the ships and aircraft of all countries enjoy the high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines, and compatible with the other provisions of international law reflected in the 1982 Convention on the Law of the Sea.

Nothing in this proclamation:
(a) amends existing Federal or State law;
(b) amends or otherwise alters the rights and duties of the United States or other nations in the Exclusive Economic Zone of the United States established by Proclamation 5030 of March 10, 1983; or
(c) impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction.

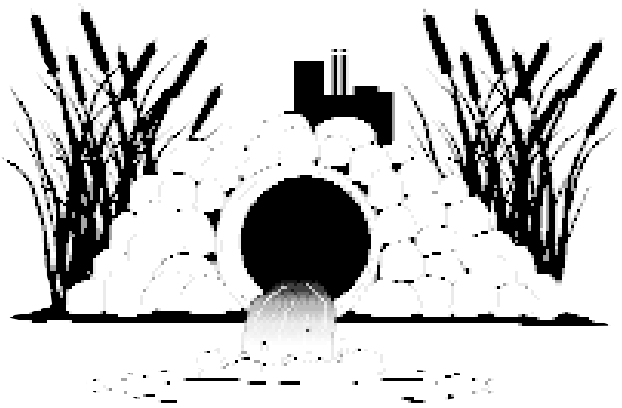
IN WITNESS WHEREOF, I have hereunto set my hand this second day of September, in the year of our Lord nineteen hundred and ninety-nine, and of the Independence of the United States of America the two hundred and twenty-fourth.

Supreme Court Revisits Leaf River Dispute

Prescott v. Leaf River Forest Products, 1999 Miss. LEXIS 253 (Miss. 1999).

Kristen M. Fletcher, J.D., LL.M.

In the latest *Leaf River* decision by the Mississippi Supreme Court, the court found in favor of the Mississippi paper company Leaf River Forest Products, ruling on rehearing for the defendants on the theories of emotional distress, trespass, and public and private nuisance.[1] The court determined that the plaintiffs again failed to show evidence that the mill's effluent containing large quantities of dioxin was deposited on the plaintiff's properties and resulted in discoloration of the river.



Prescott was one of a group of landowners appealing the summary disposition of claims of emotional distress, trespass and nuisance for exposure to dioxin, and private and public nuisance resulting from discoloration of the river and sandbars. In March, the Supreme Court affirmed that the plaintiffs failed to produce legally sufficient evidence in support of their claims of emotional distress, nuisance and trespass for exposure to dioxin but the court remanded the case because evidence of discoloration to the river and black deposits on sandbars was sufficient to support claims of private and public nuisance. Upon rehearing, the court determined that the plaintiffs failed on the claims of private and public nuisance as well.

The plaintiffs claimed they were entitled to recover for the alleged discharge of dioxin and for a private nuisance because the mill's effluent caused discoloration to the river and deposits on the sandbars. The plaintiffs offered photographs and video tapes depicting color changes in the water, and stains on sandbars, allegedly resulting from the discharged effluent. The court recognized in *Ferguson*, a previous Leaf River case, that a plaintiff may recover under a claim of private nuisance for discoloration of the water, river banks, and sand bars because the "'riparian proprietor' [has] a right to use the water in question 'in its natural purity, or in the condition in which he has been in the habit of using it.'"[2] The *Ferguson* plaintiffs failed on the private nuisance claim because they failed to show that the discoloration of the river and the sandbars affected their properties.

Similarly, the court found that, notwithstanding the pictures and videos depicting discoloration, the plaintiffs failed to offer legally sufficient proof that the alleged discoloration affected the river adjacent to property belonging to any of the plaintiffs, or that there were black deposits on sandbars on or near property belonging to the plaintiffs.

Moreover, the plaintiffs failed on the public nuisance claim because they failed to offer proof that they suffered any harm different from that of the general public. The court explained that a "complainant seeking to recover for a public nuisance 'must have sustained harm different in kind, rather than in degree, than that suffered by the public at large.'"[3] Interference with the condition of land is sufficient to show a different kind of harm but the court repeated that the plaintiffs' claims failed because they did not present legally sufficient evidence that their property was affected by any discoloration.

Endnotes

1. Original opinion of March 4, 1999, was reported at 1999 Miss. LEXIS 90. *Also see* John A. Duff and Michael L. McMillan, *Paper Mill Prevails in River Dioxin Suits*, 17:3 WATER LOG 1 (1997) for information on the series of Leaf River cases.
2. *Leaf River Forest Products v. Ferguson*, 662 So.2d 648, 664 (Miss. 1995).
3. *Prescott* at *26, *citing Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc.*, 521 So.2d 857, 861 (Miss. 1988).

Casino, from page 1

Background

During the early 90's, the Pine Hills Development Partnership (Pine Hills) proposed a casino on an artificial watercourse, which was to be created by diverting waters from the Bay of St. Louis northward through two man-made channels, running a quarter of a mile inland to an artificial cove carved out of dry land in Harrison County. The Mississippi Gaming Commission (MGC) permitted the site but it was successfully challenged by citizen groups. The Mississippi Supreme Court determined that an appropriate site cannot be located on an artificial inlet dredged from dry ground.[2]

In 1996, Pine Hills tried again and received a permit from both the MGC and the Commission on Marine Resources (CMR) to place a resort and casino vessel a half mile east of the Hancock-Harrison county line on the north shore of the Bay of St. Louis. Citizen groups again objected to the location of the casino and challenged the decisions on the basis that the MGC and the CMR acted arbitrarily. Nonetheless, the site and the permits were approved by Harrison County Courts.[3]

Challenges to the MGC

On appeal, the citizen groups argued that the MGC improperly authorized that up to 50% of the vessel may be located on land above mean high tide. Relying on the court's first Pine Hills decision, the groups argued that the earlier proceeding not only prohibited dredging to create an appropriate site but also prohibited the location of 50% of a gaming vessel on land. The court found that no statutes or case law could be construed as requiring this 50% figure.

Relying on the Mississippi Code's definition of "cruise vessel" as a vessel with a minimum draft of six feet and "navigable waters" as waters in their natural state, the citizen groups then argued that the vessel could not be located in natural waters less than six feet deep. Pine Hills responded that no provision of law required water capable of supporting a casino vessel to exceed a depth of six feet before site improvement could be conducted. The Court agreed and held that because the site was located in coastal waters, as opposed to the navigable waters of the Mississippi River, dredging would be allowed to accommodate a vessel with a six-foot draft.

Challenges to the CMR

The citizen groups also challenged the CMR's change of use designation for the proposed site. The proposed site was originally designated as a "General Use" or "G" designation under the Mississippi Coastal Program which allows only minor changes such as piers, bulkheads, and launching ramps. At Pine Hills' request, the CMR changed the use designation to a "Water Dependent Industry Use" or "I" designation which authorizes more development such as dredging and filling to advance the permitted uses.

The citizen groups likened this change to a land use zoning change and claimed that the only way to change the use designation was to prove that (1) there was a mistake in the original zoning plan or (2) that the character of the area had changed so significantly, that it justified a change.[4] The court refused to apply the zoning rule to changes in use designations under the Coastal Program because while municipal zones are intended to be permanent, the Coastal Program's wetlands use plan is flexible in order to serve the higher public interest of reasonable expansion of water dependent industries.

The court concluded by finding that the CMR required Pine Hills to satisfy conditions aimed at protecting the environment and deferring to the agency's determination that these conditions afforded adequate protection to the coastal wetlands in that area.

Conclusion

With this decision, the Mississippi Supreme Court has placed its stamp of approval on the location of Pine Hills' casino and resort in the Bay of St. Louis in Harrison County. Moreover, the Court clearly articulated its deference to permit determinations by state agencies such as the Gaming Commission and Commission on Marine Resources.

Endnotes

1. The citizen groups were the Concerned Citizens to Protect the Isles and Point, Bay St. Louis Community Association, Preserve Diamondhead Quality, and Gulf Islands Conservancy.
2. *Mississippi Casino Operators Association v. Mississippi Gaming Commission*, 654 So. 2d 892 (Miss. 1995).
3. The Harrison County Chancery Court affirmed the CMR permits and the Circuit Court affirmed the MGC permits. The decisions of the Chancery Court and the Circuit Court were consolidated on appeal.
4. This is known as the "change or mistake" rule. 735 So.2d at 377.

On the Line with NMFS and EFH

Interview with Thomas E. Bigford, NMFS Office of Habitat Conservation

As WATER LOG reported in Issue 19:1, the Essential Fish Habitat (EFH) amendments have taken effect around the nation. The National Marine Fisheries Service (NMFS) Office of Habitat Conservation has led the effort to inform state and federal agencies of the requirements and impacts of EFH. Thomas Bigford, Chief of the Habitat Protection Division at the Office of Habitat Conservation, tells WATER LOG about NMFS' role and the future of EFH.

WATER LOG: What are the NMFS and the Office of Habitat Conservation's roles in implementing the Congressional EFH mandate?

Bigford: The NMFS has a major role in implementing the EFH mandate. The agency developed guidelines to assist in the description and identification of EFH and leads the effort to develop the new EFH consultation process to apply EFH information to state and federal decision making. The fishery management plan amendment process was supported by collaboration with eight fishery management councils, our partners in state and federal agencies, representatives from fisheries and other industry sectors, and staff at NMFS laboratories and offices. Together, information was collected on more than 700 managed species and their habitats, resulting in summaries and maps for the EFH amendments. The consultation process depends on strong collaboration, especially from NMFS regional offices, the primary contacts with state and federal agencies. The Office of Habitat Conservation has maintained an active role in EFH-related issues since before its enactment, when we envisioned that Congress would add significant habitat language. Since the 1996 amendments, the Office has worked closely with the NMFS regional offices and Councils to coordinate the EFH program. Specifically, the Office has coordinated several national teams to provide input on the guidelines, to develop companion guidance packages, to initiate discussions with agencies about consultation, and to provide general support on technical issues such as tracking consultations and developing GIS map products to post on websites of NMFS and its partners.

WATER LOG: Are federal agencies and the public aware of the EFH mandate and the importance of habitat to the nation's fisheries?

Bigford: We hope so, but NMFS will continue its outreach efforts to improve public and private sector awareness. The rulemaking process in 1996-1998 was very public, including more than 30 public meetings around the nation. Through mailings and special meetings, NMFS and the councils invited direct participation from all affected sectors, including fishing and non-fishing industries. We produced a general EFH brochure in 1998, are producing two focused pamphlets this fall, and are developing website products for public use. We've also met with federal and state agencies across the country to explain the EFH consultation process and its effect on their programs.

WATER LOG: The first step in increasing attention to habitat is identification of EFH. Recognizing the broad definition of EFH, have the Councils prevailed in identifying the particular EFH areas?

Bigford: Yes, most Councils identified EFH for each species and for each life stage. There were some information gaps for species that will require further attention in the next round of EFH amendments. After gathering the best available scientific information, Councils used a variety of criteria to ensure that they emphasized those areas with the highest apparent value to managed species. Since each life stage occurs in a discrete niche and more than 700 species are under federal management, it is no surprise that the EFH designations span many of our marine, estuarine, and riverine areas. Over the next few years, as information improves, EFH designations will be refined and perhaps narrowed geographically. In the interim, most Councils are using the "habitat area of particular concern" (HAPC) provision in the EFH guidelines to focus research and management attention on discrete areas or habitat types that are most vulnerable, rare, or imperiled. In fact, several Councils are involved in identifying HAPCs or a type of special management areas: the Gulf of Mexico Council is considering the use of reserves and the New England Council is considering a proposed HAPC for juvenile Atlantic cod. Much work remains but the Councils have done an excellent job of identifying EFH in a careful, scientifically defensible approach that reflects the risk averse intentions of Congress and the agency's mandate to maintain sustainable fisheries.

WATER LOG: After EFH is identified, federal agencies must consult with the NMFS and Councils regarding activities in these areas. Has this consultation component been successful so far?

Bigford: Yes. The process began when EFH amendments to fishery management plans were approved by the Secretary of Commerce. Some EFH designations have only been in place for a few months now, so it will be a while before federal agencies fully incorporate the EFH consultation process into their routine operations. The Office of Habitat Conservation has been meeting with headquarters offices in other agencies to ensure that they are aware of the law and familiar with the consultation requirements. We've also been working with major industry sectors like the home builders, aquaculturists, and oil and gas sectors to prepare them for EFH consultation. Most importantly, we've made tremendous progress on a variety of agreements with agencies to narrow our consultation focus on those actions that pose the greatest threats to EFH, adding efficiency to the program and confirming our commitment to use existing environmental review processes. Because NMFS and other federal agencies are relying heavily on existing environmental review processes like NEPA and the 10/404 permit reviews, we believe the consultation process is working without slowing down public or private sector decisions.

WATER LOG: Generally, the Magnuson Act mandates NMFS to manage fisheries in federal waters. How does EFH apply to state waters?

Bigford: The Magnuson Act applies throughout the range of managed species, often extending into state waters for some life stage. The Council amendments designated EFH in state and federal waters, analyzed the full range of possible threats to those habitats, and recommended conservation measures to minimize threats to EFH. Throughout that process, there was very little difference between state or federal waters. However, there is an important distinction in the EFH consultation arena. While federal agencies must consult with NMFS on actions that may adversely affect EFH, state agencies are not required to notify NMFS but we still have the obligation to provide conservation recommendations. When dealing with the effects of fishing activities that may affect EFH, our regulatory authority applies only to fishing impacts in federal waters.

WATER LOG: Environmental groups believe that the EFH mandate is not strong enough because it does not preclude those activities that adversely impact it. On the other hand, many user groups, especially fishing communities, are worried that implementation of EFH will limit their ability to maintain a livelihood. Can you comment on these concerns?

Bigford: We have tried to give full consideration to all concerns in our implementation of the EFH mandate. First, the mandate required NMFS and the Councils to assemble the most complete set of habitat documents ever provided to decision makers. Second, the mandate requires federal agencies to give greater weight to fish habitat concerns. Third, Congress required that this process be well documented and public, thereby improving public participation in decisions affecting fish habitat. Each of those improvements builds on the traditional natural resource stewardship role that NMFS has been performing for nearly 30 years under the Clean Water Act and other laws. There's also dozens of fishery management actions that have closed areas, restricted gears, or imposed other measures that benefitted habitat. When added to our historic roles, the EFH provisions should help the environment, the fish that depend on healthy habitats, recreational and commercial fishing industries that require sustainable stocks, and coastal communities.

WATER LOG: Finally, what will be the greatest challenge in implementing EFH into fisheries management?

Bigford: Undoubtedly, our first major hurdle was to assemble the best available scientific information to incorporate habitat perspectives into fisheries management. Congress also requires that NMFS consult with all agencies whose actions may adversely affect EFH, which could potentially increase the total number of consultations above historic levels. Our challenge in that arena is to develop agreements with other agencies to limit detailed consultations to those activities with significant potential to adversely affect EFH. One final challenge is to provide full participation of our partners and colleagues in other agencies, states, and the private sector. Each of these challenges will continue for many years to come.

For more information on EFH, visit the Office of Habitat Conservation homepage at http://www.nmfs.gov/habitat/ and the Legal Program site for a slide show describing EFH at http://www.olemiss.edu/pubs/waterlog/slide.htm .

Court Addresses Speech at the Beach

One World One Family Now v. City of Miami Beach, 175 F.3d 1282 (11th Cir. 1999).
Smith v. City of Fort Lauderdale, Florida, 177 F.3d 954 (11th Cir. 1999).

John A. Duff, J.D., LL.M., M.A.

Beach areas attract significant numbers of visitors. In an effort to protect these areas and the people who frequent them, municipalities enact ordinances aimed at maintaining and enhancing public access by restricting certain types of activity. Occasionally these efforts are viewed as running afoul of individual liberties such as freedom of expression. Recently, a federal appeals court issued two rulings outlining the extent to which certain activities – acknowledged as attributes of constitutionally protected speech – may be limited at public beaches. Both cases arose from challenges to town ordinances in Florida restricting commercial activities on or along public beaches. In both instances, the court relied on a series of questions that required resolution in the affirmative to uphold the ordinances:

- does the area at issue constitute a public forum?
- does the activity at issue constitute speech?
- does the enforcement of the ordinance restrict speech in a constitutionally valid manner?

The Miami Beach case

In an effort to protect the ambience of the Art Deco district of Miami Beach, the city had prohibited virtually all commercial activity from public streets and sidewalks in the area except the opportunity for restaurants situated in the area to set up tables and chairs as outdoor café extensions of their establishments. Another exception was the Nonprofit Vending and Distribution Ordinance which allowed nonprofit groups the limited use of tables for solicitation and vending at five locations on the east side of the street in the commercial district from 8 a.m. to one half hour after sunset. In *One World One Family Now v. City of Miami Beach*,[1] a nonprofit organization argued that the city's restriction on the place and time for setting out tables used to sell message-bearing t-shirts emblazoned with slogans amounted to an unconstitutional violation of the First Amendment free speech guarantee.

The Appeals Court, citing the U.S. Supreme Court's holding that a public sidewalk "is a quintessential public forum,"[2] quickly moved on to the activity at issue to determine whether it constituted speech, and if so, whether the ordinance in question could validly restrict the activity. The Court relied on an earlier 11th Circuit decision to divine that setting up tables may constitute an attribute of "expressive activity" governed by the First Amendment.[3] The final question, therefore, was whether the ordinance at issue met the 'content neutral' and 'time-place-manner' tests articulated by the Supreme Court.

Applying the Supreme Court's 'content-neutral' standard, the 11th Circuit ruled that the Miami Beach ordinance did not restrict expression based on the content thereof. The 11th Circuit then applied the time-place-manner test which requires that any restriction on speech must be narrowly tailored to maintain opportunities to express ideas and opinions in public. Upon review of the Miami Beach ordinance, the court found that the narrow manner in which the restrictions were applied preserved One World's opportunity to express itself in nearby areas, for sufficient time and in a valid manner. As a result, the court upheld the ordinance.

The Fort Lauderdale case

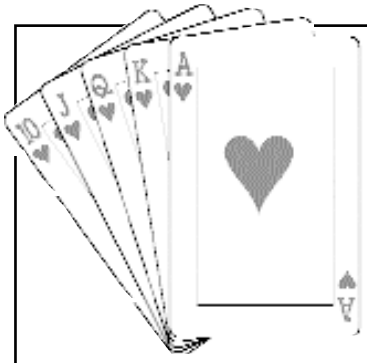
In an effort to stem begging in the vicinity of Fort Lauderdale's beaches, the city enacted an ordinance proscribing panhandling along a five mile strip of the beach and adjacent sidewalks. A group of homeless persons challenged the ordinance as a First Amendment violation. The federal district court ruled in favor of the city and the plaintiffs appealed. The 11th Circuit addressed

the case in *Smith v. City of Fort Lauderdale, Florida*.[4]

Because no challenge was raised as to the 'content-neutrality' of the ordinance, the court addressed the argument regarding the sufficient narrowness of the prohibition. As it did in the *One World* case, the court found that the area constituted a public forum and proceeded on to the 'content-neutral' and 'time-place-manner' tests. The court found that since the ordinance left the door open for begging in nearby areas and was substantially related to a significant governmental interest outlined in its stated objectives "to eliminate nuisance activity on the beach and provide patrons with a pleasant environment in which to recreate,"[5] the rule was sufficiently narrow to survive the First Amendment claim.

Endnotes

1. 175 F.3d 1282 (11th Cir. 1999).
2. *Id.* at 1285 (quoting *Perry Educ. Ass'n. v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983)).
3. *Id.* at 1286 (quoting *International Caucus of Labor Committees v. Montgomery*, 111 F.3d 1548, 1550, 1551-53 (11th Cir. 1997)).
4. 177 F.3d 954 (11th Cir. 1999).
5. *Id.* at 955-957 (quoting City of Fort Lauderdale Rule 7.5(c)).



US Supreme Court: Multi-State Casino Advertising Legal

Greater New Orleans Broadcasting Association, Inc. v. United States, 119 S.Ct. 1923 (1999).

Kristen M. Fletcher, J.D., LL.M.

Another First Amendment challenge by an association of Louisiana broadcasters and its members may have increased the chances for Mississippi casinos to attract more business. The U.S. Supreme Court recently held that the prohibition on the broadcasting of lottery information cannot be applied to advertisements of lawful private casino gambling, such as the casinos on the Mississippi coast, even though the broadcasts may be heard in neighboring states where gambling is illegal.

The Broadcasting Association argued that restricting multi-state broadcasts was violative of the First Amendment. The Court applied a four-part test (the "Central Hudson test") to determine whether the casino advertising is protected by the First Amendment. First, the speech must concern lawful activity and must not be misleading. The Broadcaster's advertising met this requirement as the speech concerned lawful private casino gambling in Louisiana and Mississippi and disseminated accurate information to consumers. Second, the governmental interest asserted in restricting the speech must be substantial. While the Court found that the government has identified an interest in reducing the social costs associated with gambling, it also reproached the government's inconsistent application of restrictions by pointing to the absence of such restrictions on the advertising of tribal casinos.

Because these two questions yielded positive answers, the Court then asked if the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest. The restriction failed because "any measure of the effectiveness of the government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling, which may well be growing at a rate exceeding any increase in gambling or compulsive gambling that private casino advertising could produce." (119 S.Ct. at 1933.) After criticizing the overall structure of gambling and gambling advertisement regulation, the Court struck down the restrictions on multi-state casino broadcasting, concluding that "[h]ad the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in States that have legalized [gambling], this might be a different case." (119 S.Ct. at 1936).

1999 Alabama Legislative Update

Stacy Prewitt, 2L

The following is a summary of legislation affecting coastal, natural and water resources enacted by the Alabama legislature during the 1999 session.

1999 Alabama Laws 203. (SB 251) *Enacted May 20, 1999. Effective May 20, 1999.*
The act makes corrections to the 1998 Cumulative Supplement of Alabama, § 33-4-48, asserting the pilotage fee for every vessel crossing the outer bar of the Mobile Bay, authorizing set fees for special services rendered by the pilots and omitting pilotage for certain vessels trading between a domestic port on the Gulf of Mexico and the Port of Mobile.

1999 Alabama Laws 396. (SB 92) *Enacted June 9, 1999. Effective September 1, 1999.*
Amends § 9-17-33 to allow an accumulation during one year of $100 in oil and gas proceeds prior to payment to an oil and gas royalty owner or working interest owner. In addition, the Act requires a minimum annual payment and allows owners to be paid more frequently.

1999 Alabama Laws 440. (HB 637) *Enacted June 11, 1999. Effective September 1, 1999.*
Amends § 30-3-170 to include sporting licenses in the category of licenses that can be withheld, suspended, revoked, or restricted if a license holder fails to pay child support. In addition, this Act amends § 30-3-194 to require an agency issuing a recreational or sporting license to include the applicant's social security number on the application and any related agency records. The Act amends § 30-3-193 to remove the restriction that information would be released to the state's Title IV-D agency only "if readily available."

1999 Alabama Laws 442. (HB 664) *Enacted June 12, 1999. Effective September 1, 1999.*
Amends § 9-11-257 to prohibit hunting with certain firearms and ammunition within 50 yards of public roads, highways, or railroads or their rights-of-way, with certain exceptions, and provides penalties for violations.

1999 Alabama Laws 446. (SB 378) *Enacted June 12, 1999. Effective June 12, 1999.*
Creates the Alabama Improvement Districts Act, which establishes improvement districts and provides for the issuance of revenue bonds to finance certain improvements within those districts, such as streets, water systems, sewers, sidewalks, and recreational facilities.

1999 Alabama Laws 570. (HB 270) *Enacted June 18, 1999. Effective June 18, 1999 and applies retroactively to all open tax years.*
Amends §§ 40-23-1 and 40-23-60 regarding sales and use taxes to exempt from the term "gross proceeds of sale" the refinery, residue or fuel gas that has been generated by or is a by-product of a petroleum-refining process and is then utilized in the process to generate heat or is otherwise utilized in the distillation or refining of petroleum products.

1999 Alabama Laws 571. (HB 547) *Enacted June 18, 1999. Effective September 1, 1999.*
Creates the Alabama Onsite Wastewater Board to examine, license, and regulate persons engaged in the manufacture, installation, or servicing of onsite wastewater systems and equipment. The purpose of this Act is to

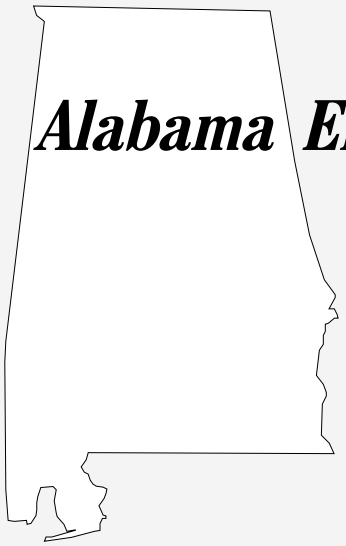
insure the proper functioning of onsite septic tank systems and avoid any damage to the public health or the environment.

1999 Alabama Laws 579. (HB 9) *Enacted June 18, 1999. Effective September 1, 1999.* Amends §§ 9-16-2, 9-16-5, 9-16-7, 9-16-8 and 9-16-12 to include new definitions. In addition, this Act requires an applicant for a surface mining permit to submit a comprehensive reclamation plan to the Department of Industrial Relations. It specifies the criteria for denial of permits, establishes limits on surface mining operations, and modifies requirements for grading and revegetating lands after mining. The Act authorizes qualified land reclamation inspectors to make inspections for bond releases and allows bond forfeiture proceeds to be used to reclaim other affected lands.

1999 Alabama Laws 584. (HB 605) *Enacted June 18, 1999. Effective September 1, 1999.* Amends § 9-17-25 and § 40-20-2 to extend reduced rates of taxation to certain oil and gas wells for which an initial permit was issued before July 1, 2002.

1999 Alabama Laws 593. (HB 674) *Enacted June 18, 1999. Effective June 18, 1999.* Amends § 9-16-91 to clarify and establish an exclusive and consistent remedy designed to fully protect surface owners from actual loss and damage to occupied dwellings and related structures, noncommercial buildings, and land resulting from surface subsidence associated with underground coal mining.

1999 Alabama Laws 595. (HB 390) *Enacted June 19, 1999. Effective September 1, 1999.* The Alabama Cultural Resources Act provides that certain underwater artifacts, archaeological finds, treasure troves, and other resources are designated "state cultural resources," and are regulated and protected by the Alabama Historical Commission. The Act prohibits the taking, damaging, or other alteration of these resources, intentionally or knowingly, without a contract or permit from the commission. The commission has the authority to make and enforce rules and regulations regarding a management plan for the resources. The commission can restrict commercial fishing in the immediate vicinity of the resources, impose criminal penalties for violations, authorize the seizure of boats and instruments used in violation of this Act, and direct all state and local law enforcement authorities and officers to assist the commission in the enforcement of this Act. In addition, the commission has the power to grant exemptions from permitting requirements for activities that are conducted pursuant to certain federal permits, and to allow the curing of certain violations where the violating activities are stopped and required permits are sought.



Notable Proposed Bill

Alabama Environmental Policy Act of 1999

(House Bill 727)

The purpose of the Alabama Environmental Policy Act of 1999 was to establish an environmental policy that would require state agencies to identify and consider the environmental impacts of proposed actions. The Act would require state agencies to prepare environmental impact statements and hold public hearings before going forward with a project which would have an impact on the environment. The bill died in committee on June 9, 1999.

Mississippi is Home to Nation's 24th NERR

Grand Bay National Estuarine Research Reserve is Designated

Adapted from a NOAA Press Release

Grand Bay National Estuarine Research Reserve. *Photo by Kristen Fletcher*

Approximately 18,400 acres of tidal marsh, shallow-water open bay, wet pine savanna, and coastal swamp habitats in southeast Jackson County have been designated as the Grand Bay National Estuarine Research Reserve, the Commerce Department's National Oceanic and Atmospheric Administration reported after NOAA Administrator D. James Baker signed the paperwork officially designating the reserve.

"We are delighted that the Grand Bay reserve has joined our national network of living laboratories. The research reserve system is a perfect example of how governments and communities can work together to benefit both the environment and people," Baker said. "We're very proud of the estuarine research reserve program, and pleased to welcome the state of Mississippi into the NERR family," Baker said.

Grand Bay is the 24th site in NOAA's nationwide network of research reserves dedicated to the study and preservation of these sensitive environments where rivers meet the ocean. NOAA administers the national NERR program, but individual reserves are operated by state agencies. The Mississippi Department of Marine Resources (DMR) will oversee the Grand Bay Reserve.

"It is great to be a part of such an outstanding program and to have an area in our state designated as the 24th National Estuarine Research Reserve," said DMR Executive Director E. Glade Woods. "I want to thank all of the federal, state and local agencies and private citizens who have helped make this designation a reality."

The open water estuarine areas of Grand Bay NERR support extensive productive oyster reefs and seagrass habitats. Some of Grand Bay NERR is already designated as a state estuarine preserve, and other areas are part of the U.S. Fish and Wildlife Grand Bay Savanna National Wildlife Refuge. NERR status opens the door for new federal-state supported research and education to help students, scientists, elected officials, and the general public understand these beautiful, productive, and irreplaceable areas and make better decisions about protecting and managing them. Grand Bay is also unique for its close proximity to Chevron's Pascagoula Refinery, allowing for promising research on both developed and undeveloped coastal lands.

A dedication ceremony for the Grand Bay NERR will be held later this year. A temporary office will be located at 6005 Bayou Heron Road in Pascagoula.

For information on the nomination and designation process, see Grand Bay Nominated Estuarine Research Reserve, 17:3 WATER LOG 1 (1997).

Lagniappe *(a little something extra)*

Around the Gulf . . .

The Sustainable Seas Expeditions (SSE), the first systemwide exploration of the deep waters of the National Marine Sanctuary System, completes its 1999 Mission in the Gulf this fall. During a mission to the Florida Keys Marine Sanctuary in August, SSE focused on exploration and characterization of deep coral reef environments and in September, SSE visited the Flower Garden Banks Marine Sanctuary (TX) just in time for the coral equivalent of Mardi Gras, the release of billions of gametes in a mass coral spawning. See SSE's website at http://sustainableseas.noaa.gov/ .

In August, three environmental groups sued the state of Florida claiming the legislature restricted the ability of the Florida Fish and Wildlife Conservation Committee to protect sea turtles and manatees after limiting rulemaking authority over endangered or threatened species which must be approved by the governor or legislature.

On September 1, the Texas Coastal Erosion Planning and Response Act took effect, providing the mechanism for Texas to receive millions of federal dollars in funding and authorizing the General Land Office to implement a comprehensive coastal erosion response program that can include designing, funding, building, and maintaining erosion projects.

In the longest sentence meted out in a federal environmental crimes case, Gary Benkovitz was sentenced to 13 years in prison for illegally dumping hazardous waste into a storm sewer that empties into McKay Bay near Tampa.

Around the Nation and the World . . .

In May, the U.S. Supreme Court determined that a U.S. Fish and Wildlife Service officer and an assistant U.S. Attorney violated the Fourth Amendment rights of homeowners by allowing members of a CNN media crew to accompany them during the execution of a warrant in their home. (*Hanlon v. Berger*, 119 S.Ct. 1706 (1999).)

The Lands Council of Spokane, Wash., the Idaho Conservation League and Idaho Rivers United filed suit Monday against the EPA for violating the Endangered Species Act by allowing discharges of toxic wastewater by a pulp mill in Lewiston, Idaho without consulting with National Marine Fisheries Service and U.S. Fish and Wildlife Service regarding the effects of the discharges on the threatened and endangered fish species such as migrating salmon, steelhead and bull trout.

In August, the International Tribunal for the Law of the Sea issued a temporary injunction against Japan requiring it to abide by catch limits on the threatened southern bluefin tuna, finding in favor of Australia and New Zealand which claimed increased fishing by Japan threatens irreversible damage to the population. The decision also requires that Japan subtract its experimental catch of up to 2,000 tons from its total annual quota for the tuna.

WATER LOG (ISSN 1097-0649) is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under Grant Number NA86RG0039, the Mississippi-Alabama Sea Grant Consortium, State of Mississippi, Mississippi Law Research Institute, and University of Mississippi Law Center. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. The views expressed herein are those of the authors and do not necessarily reflect the views of NOAA or any of its sub-agencies.

MASGP-99-004-03
This publication is printed on recycled paper.

Hurricane Camille, Thirty Years Later

Hurricane Camille August 5-22, 1969

This fall, coastal residents are riding out the 1999 hurricane season, as residents of Mississippi remember Hurricane Camille, one of the nation's most powerful hurricanes thirty years after it made landfall along the Mississippi coast in August of 1969. Spawned by a tropical wave off the African coast, Camille became a full-blown hurricane southeast of Cuba and intensified in the Gulf of Mexico, with winds up to 200 miles per hour. Camille made landfall on August 17th, its center passing over Clermont Harbor, Waveland, and Bay St. Louis with a devastating storm surge that flooded coastal areas from Louisiana to Alabama. Camille ripped a swath of destruction along the entire length of the Mississippi coast. In low areas, the rows of houses stopped a block or two from the beach leaving only bare foundations along the beach front. From Pascagoula to Pass Christian, piles of lumber, building materials and trees were thrown together by the surge. Highway 90, the main coastal thoroughfare, was covered with sand in many sections and completely washed away in other sections. Camille weakened as she moved northward through Mississippi but combined with a weather system in Virginia causing, in total, $1.42 billion in damage and over 250 deaths.

WATER LOG
Mississippi-Alabama Sea Grant Legal Program
Lamar Law Center, Room 518
University, MS 38677

University, MS 38677

Non-Profit Org.
U.S. Postage
PAID
Permit No. 6