Volume 22, Number 2, 2002

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Mississippi Court Places Hold on Big Sunflower River Project

Sierra Club v. Miss. Dept. of Envtl. Quality, 819 So. 2d 515 (Miss. 2002).

S. Beth Windham, 3L
Magnolia Bravo, M.S., J.D.

The Mississippi Supreme Court reversed the Department of Environmental Quality's (DEQ) grant of certification to the Big Sunflower River Maintenance Project because the DEQ failed to make adequate findings or explain the reasoning for its decision. The Court remanded the certification to the Chancery Court with instructions to forward it to the DEQ for more findings and analysis.

Background

The Big Sunflower River Maintenance Project (Big Sunflower) is a channeling project proposed by the U.S. Army Corps of Engineers (Corps) to alleviate flooding in the Yazoo-Mississippi Delta, which occurs every one to five years. The Corps estimates that Big Sunflower will result in a six-inch reduction in water level and affect approximately 56,000 acres of the Big Sunflower River Basin. Big Sunflower is expected to have a significant impact on rivers, streams, wetlands, and wildlife in the areas within the basin, including the dredging of over 100 miles of stream and the clearing of over 28 miles of several rivers. Project critics note that Big Sunflower will render 443 acres of forested wetlands unfit for their current uses, and 552 acres of forested wetlands will face alterations in flood patterns resulting in the drainage of the areas. In addition to damage to the land, Big Sunflower will destroy approximately 43% of mussel beds in the

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State May Control Pilots Past Three-Mile Seaward Boundary

Gillis et al. v. State of La., 294 F.3d 755 (5th Cir. 2002).

Jason Dare, 3L

The Fifth Circuit recently reviewed whether Louisiana may regulate boat pilots outside its three mile state water boundary in the Gulf of Mexico. The Court found that even though a state retains title to lands submerged under water up to three miles beyond its shoreline, that state's right to control navigation may extend past the three-mile line.

Background

The Calcasieu Ship Channel (CSC) runs from the Port of Lake Charles, Louisiana, down through the Calcasieu River and out 33 miles into the Gulf of Mexico. The State of Louisiana owns the land beneath the Port and the River, because each is a navigable

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No Absolute Title to *Titanic* Artifacts

R.M.S. Titanic *v. The Wrecked and Abandoned Vessel et al.*, 286 F.3d 194 (4th Cir. 2002).

Magnolia Bravo, M.S., J.D.

The Fourth Circuit recently ruled that the *R.M.S. Titanic* salvor-in-possession did not have absolute title to all artifacts retrieved from the shipwreck. Instead, the salvor had the right to possess the artifacts and the right to be rewarded for its salvage activities through enforcement of a valid salvage lien.

Salvaging from the *Titanic*

In 1985, an expedition discovered the wreck of the *Titanic* and two years later, Titanic Ventures explored the wreck, ultimately salvaging about 1800 artifacts. Titanic Ventures later sold its interests to R.M.S. Titanic Inc. (RMST).

In 1993, RMST petitioned the district court to become salvor-in-possession[1] of the *Titanic* and on June 7, 1994, the district court awarded RMST that right,[2] with the understanding that RMST intended to display the salvaged artifacts rather than selling them and with the understanding that RMST had to periodically report to the court concerning the progress of its salvage operations. RMST continued to conduct salvage operations and display the artifacts recovered through 1999, when RMST's new management team revised the corporation's business plan to include the possible sale of artifacts to increase corporate revenues. RMST did not follow through with any sales, but in July 2000, when the district court heard about the revisions to the business plan, it entered an order directing RMST not to sell or dispose of any artifacts from the wreck. The district court explained that RMST's salvor-in-possession status was dependent on the understanding that any recovered artifacts would be displayed to the public and not sold.

In April 2001, RMST asked the district court for clarification of its July 2000 order, explaining its plans to form a new foundation to "explore the acquisition of the artifact collections at some time in the future."[3] The district court directed RMST not to sell any artifacts from the wreck,[4] but in July 2001, RMST issued a report to the district court outlining the formation of the Titanic Foundation, Inc. and the Foundation's plan to purchase artifacts from RMST. The district court ordered a full hearing, at which the court discovered that both the Foundation and RMST would be managed by the same people, creating irreconcilable conflicts of interest within each entity. The district court reaffirmed its original orders barring all artifact sales.

Rights of a Salvor-In-Possession

After ruling that the court had jurisdiction over the case,[5] the court considered RMST's argument that the court's original order declared that RMST was the "true, sole and exclusive owner" of any salvaged artifacts.[6]

Traditionally in salvage law, someone who finds property at sea doesn't acquire absolute rights to what has been found. Instead, the person gains the right to possess the property with a reasonable reward for his or her services. The person secures the right to this reward through a salvage lien against the property. The court reasoned that when RMST found the shipwreck, performed the salvage service, and the district court declared RMST salvor-in-possession, RMST had a right to salvage artifacts and receive its rewards through liens on the artifacts. Likewise, if RMST abandoned the wreck in the future, the *Titanic* would remain in the sea, subject to salvage by others. The

See Titanic, page 7

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, P. O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: waterlog@olemiss.edu . We welcome suggestions for topics you would like to see covered in WATER LOG.

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For information about the Legal Program's research, ocean and coastal law, and issues of WATER LOG, visit our homepage at
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From the Editor's Desk

In this issue, it is my pleasure to introduce to you the new team that we have assembled to provide the legal research, outreach, and education services of the Mississippi-Alabama Sea Grant Legal Program and National Sea Grant Law Center. Over the summer, Waurene Roberson, the Communications Coordinator, and I welcomed Magnolia Bravo (Research Counsel), Edie King (Legal Assistant), and Stephanie Showalter (Research Counsel).

Waurene serves as our publications and web coordinator while Edie will oversee budgetary and administrative responsibilities and assist in the development of the Sea Grant Law Center. Maggie and Stephanie are conducting legal research and in the coming year, Maggie will take over as Editor for WATER LOG and Stephanie will become Editor for THE SANDBAR.

It is an honor for me to work with such a bright and dedicated staff and I hope you will join me in welcoming them. Information about each of us is below, along with our e-mail addresses. Please let us know what the Sea Grant Legal Program and Law Center can do to help you in your ocean and coastal work.

Kristen M. Fletcher, Editor

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Kristen received a B.A. from Auburn University, J.D. from the University of Notre Dame Law School, and LL.M. in Environmental Law from Northwestern School of Law of Lewis & Clark College. She is researching marine zoning, fisheries law, and habitat issues. She is Editor of WATER LOG and THE SANDBAR and teaches Coastal and Ocean Law and Natural Resources Law.

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Waurene is the Communications Coordinator for both the Mississippi-Alabama Sea Grant Legal Program and the Sea Grant Law Center. She is responsible for the design, layout and production of THE SANDBAR and WATER LOG, and designs and maintains the web pages for Sea Grant at The University of Mississippi.

Edie King, Legal Assistant, eking@olemiss.edu
As Legal Assistant for Sea Grant Law Center, Edie is the liaison for Center outreach activities including research requests, meetings, and presentations. She also serves as an assistant for research projects and manages Center budgets. Edie is responsible for coordinating conferences and other events hosted by the Sea Grant Law Center.

Courts Limit EPA's Obligation to Establish and Implement TMDLs

Jason Dare, 3L

Over the last decade, federal courts have issued decisions and approved consent decrees that have made the total maximum daily load (TMDL) "requirement" under the Clean Water Act a reality. When a state does not establish or implement TMDLs, the total amount of pollutants a waterbody can receive from all sources, the Environmental Protection Agency (EPA) may do so. Two recent circuit court decisions from the 11th and 9th Circuits provide guidance regarding the establishment and implementation of TMDLs.

Constructive Submission Doctrine

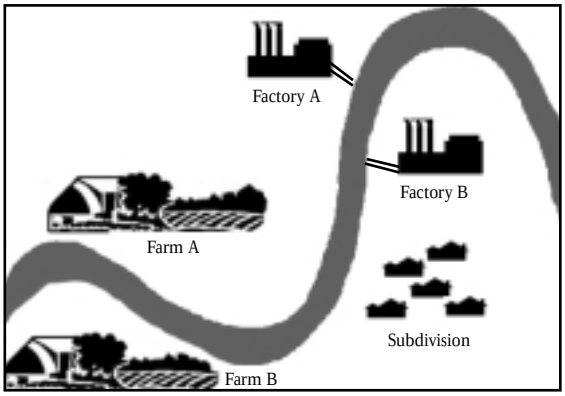
San Francisco Baykeeper v. Whitman, 2002 U.S. App LEXIS 14394 (9th Cir. July 17, 2002).

In its recent ruling, the Ninth Circuit held that the EPA has a non-discretionary duty to establish TMDLs when a state makes little or no effort to establish the TMDLs itself. In Baykeeper, various environmental groups (hereinafter "Baykeepers") filed suit in the U.S. District Court for the Northern District of California to compel the EPA to establish TMDLs for California. Originally, states were required to identify all impaired water bodies in the state or Water Quality Limiting Segments (WQLS) and calculate TMDLs for them on or before June 26, 1979. In 1994, fifteen years after the deadline, California submitted its first TMDL. Since 1994, however, it submitted at least eighteen TMDLs and scheduled to complete all remaining ones within the next twelve years. The district court ruled that the EPA was required to establish a state's TMDLs only when it objected to a TMDL the state submitted. Baykeepers appealed to the Ninth Circuit and argued that the EPA had a duty to act both when a state fails to submit TMDLs or submits inadequate ones.

Baykeepers relied on the Constructive Submission Doctrine which states that "when a state fails over a long period of time to submit proposed TMDL's, this prolonged failure may amount to the 'constructive submission' by that state of no TMDL's."[1] Once a state is deemed to have submitted no TMDLs, the EPA has a non-discretionary duty to establish TMDLs for the state. However, the Constructive Submission Doctrine is very narrowly interpreted. In fact, courts will apply the doctrine only "when the state's actions clearly and unambiguously express a decision not to submit TMDLs."[2] Following persuasive authority by other circuits, the Ninth Circuit ruled that the Constructive Submission Doctrine did not apply.[3] Because California submitted at

What is a TMDL?

A TMDL or Total Maximum Daily Load is the maximum amount of pollutants a water body can receive daily without impairing activities such as fishing, shellfish cultivation, primary or secondary recreational contact or incidental contact.



A TMDL is calculated by adding all discernable discharges of pollutants (load allocation), such as factories, all indistinguishable sources of pollution (waste load allocation), such as farms and subdivisions, and a margin of safety. Factory A and Factory B, for example, have pollution discharge pipes emptying into the river. These pipes can be specifically tested for discharges and therefore the factories have point source discharges. Farm A, Farm B, and the subdivision, on the other hand, have runoff that empties into the river, called non-point source discharge. The TMDL for this river segment must account for all of these sources of pollution.

To learn more about TMDLs, visit EPA's Office of Water website at http://www.epa.gov/owow/tmdl.

least eighteen TMDLs and had plans to submit its remaining TMDLs within twelve years, the court held the state's actions were not a clear and unambiguous expression against submitting TMDLs.[4] Therefore, the EPA merely had a discretionary duty to establish TMDLs for California's polluted water bodies.

Baykeepers also contended that, based on the unambiguous language of § 303(d)(2), California was required to simultaneously submit both its water quality limiting segment (WQLS) priority list and its TMDLs.[5] Because California made several WQLS submissions from 1980 through 1991, but did not simultaneously submit TMDLs, Baykeepers argued that the EPA had a non-discretionary duty to establish TMDLs for California. The EPA previously interpreted the language of § 303(d)(2) to mean that submissions of WQLS priority lists were due every two years since June 26, 1979, the original deadline for WQLSs and TMDLs. The EPA never set a definite schedule for TMDL submissions. Supreme Court precedent directs that when statutory language is ambiguous, "courts should defer to reasonable agency interpretations."[6] The Ninth Circuit held that the EPA's interpretation of § 303(d)(2) was reasonable and that the EPA's interpretation did not require simultaneous submission of WQLSs and TMDLs. Accordingly, the EPA did not have a non-discretionary duty to establish TMDLs for California when the state submitted WQLS priority lists without submitting TMDLs.

Implementing TMDLs

Sierra Club v. Meiburg, 296 F.3d 1021 (11th Cir. 2002). The Eleventh Circuit recently held in *Meiburg* that there is a difference between establishing and implementing TMDLs. From 1979 to 1994, Georgia established only two TMDLs for its approximately 340 listed WQLS water bodies. In 1994, Sierra Club and numerous other environmental entities (hereinafter "Sierra Club") filed suit in the U.S. District Court for the Northern District of Georgia to compel the EPA to establish TMDLs for the remaining water bodies. The district court ruled that the EPA must both establish and implement TMDLs for all of Georgia's limited segments by June 2001. While the EPA's appeal was pending, the EPA and Sierra Club agreed to different terms under a consent decree.[7]

Even though the EPA proposed 124 TMDLs for Georgia's WQLSs, Georgia failed to implement any of them and within the next two years, only one water body met TMDL standards. Sierra Club motioned for the district court to re-open the consent decree and order the EPA to prepare implementation plans for the 124 TMDLs. Georgia, however, created implementation plans for all of its TMDLs within nine months of the motion. The EPA subsequently filed a motion to dismiss Sierra Club's action as moot, because no question existed concerning the implementation plans. The district court denied the EPA's motion and held that the EPA was obligated to ensure Georgia's implementation plans were adequate. If not, the EPA was required to create its own TMDL implementation plans. The EPA appealed the decision to the Eleventh Circuit.

On appeal, the EPA claimed that the district court abused its discretion when it modified the consent decree.[8] Sierra Club countered that language in the consent decree gave the district court authority to modify the decree, specifically: (1)"the court retains jurisdiction over the action and may issue orders to modify the terms of the decree and grant further relief as justice requires" and (2)"nothing in the decree shall be construed to limit the equitable powers of the Court to modify those terms upon a showing of good cause by any party."[9] According to the Eleventh Circuit, however, this was merely boilerplate language. A district court can only modify a consent decree by finding (1)"a significant change either in factual conditions or in law" and that (2)"the proposed modification is suitably tailored to the changed circumstance."[10]

Applying these factors, the Eleventh Circuit noted that the Sierra Club based its argument on a law that was published as a final rule in July, 2000, but was never implemented. Congress never appropriated the necessary funds to implement the law and consequently, EPA withdrew the rule. Therefore, since EPA withdrew the rule, there had been no significant change in the law and the court could not modify the decree based on those grounds. Next, the Eleventh Circuit found no change in factual circumstances. Georgia was currently and had always been delinquent in its CWA obligations. The state's unwillingness to comply with the CWA had not changed. Finally, Sierra Club argued that because the consent decree had not reached its purpose, which presumably was clean water in Georgia, the failure was a changed circumstance that justified modification. The Eleventh Circuit reasoned that clean water was not the purpose of the consent decree. Even though Sierra Club wanted cleaner water, the deal it made with the EPA was merely to establish TMDLs. Therefore, the court held that the EPA could not be forced to implement TMDL plans in Georgia through its consent decree and Sierra

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Club would have to look "to the [CWA] and regulations, and perhaps to additional litigation, to achieve [its] worthy goals."[11]

ENDNOTES

1. *San Francisco Baykeeper v. Whitman*, 2002 U.S. App LEXIS 14394, *9 (9th Cir. July 17, 2002).
2. *Id.* at *10-*11 (*citing Hayes v. Whitman*, 264 F.3d 1017, 1024 (10th Cir. 2001)).
3. *See Hayes*, 264 F.3d at 1022-24 (ruling that Oklahoma's submission of between three and twenty-nine TMDLs, and its plans to complete 1400 TMDLs by the year 2010, meant that the Constructive Submission Doctrine did not apply); *Scott v. City of Hammon*d, 741 F.2d 992 (7th Cir. 1984) (holding that Indiana and Illinois submitted no TMDLs for Lake Michigan, unless there was "evidence indicating that the states' [were], or soon [would] be, in the process of submitting TMDL proposals").
4. Moreover, the court ruled that Baykeepers had no right to seek relief for EPA's failing to establish California's TMDLs from 1980 until 1994. *Baykeeper*, 2002 U.S. App. LEXIS 14394, at *13-*14 (*citing N.R.D.C. v. Fox*, 93 F. Supp. 2d 531, 536 (S.D.N.Y. 2000)). The court also held that the Administrative Procedures Act, which authorizes courts to "compel agency action . . . unreasonably delayed," was not applicable because the agency must first have a statutory duty. *Baykeeper*, 2002 U.S. App. LEXIS 14394, at *20-*21 (*citing* 5 U.S.C. § 706(1) (2002)); *See Madison-Hughes v. Shalala*, 80 F.3d 1121, 1124-25 (6th Cir. 1996).
5. 33 U.S.C. § 1313(d)(2) (2002) ("Each state shall submit to the Administrator from time to time . . . for his approval the waters identified and the loads established under 1(A), 1(B), 1(C), and 1(D) of this subsection.").
6. *Baykeeper*, 2002 U.S. App. LEXIS 14394, at *18 (*citing Chevron v. N.R.D.C.*, 467 U.S. 837 (1984)).
7. The terms of the consent decree stated that EPA would establish TMDLs for 20% of Georgia's limited segments by 1998, and all TMDLs by 2004 if Georgia failed to do so; review Georgia's continuing TMDL planning process; propose specific terms for Georgia/EPA Performance Partnership Agreements; review Georgia's TMDL program twice a year; and submit annual compliance reports to the court and to Sierra Club. *Meiburg*, 296 F.3d at 1027.
8. Because only final orders can be appealed and the district court's ruling was not a final order, the Eleventh Circuit could have jurisdiction over this suit only if it determined the district court modified the consent decree. Appellate courts will determine that a district court's holding modified a consent decree when it "changes the legal relationship among the parties." 28 U.S.C. § 1293 (2002). Implementation plans "were not found within [the consent decree's] four corners," or its specific language. *Meiburg*, 296 F.3d at 1025 (*citing United States v. Atlantic Refining Co.*, 420 U.S. 223, 233 (1975)). The Eleventh Circuit held that requiring EPA to implement TMDLs was a change in its legal relationship. Therefore, the consent decree had been modified and the Eleventh Circuit had jurisdiction.
9. *Meiburg*, 296 F.3d at 1030.
10. *Id.* (*citing Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384-91 (1992)).
11. *Meiburg*, 296 F.3d at 1034.

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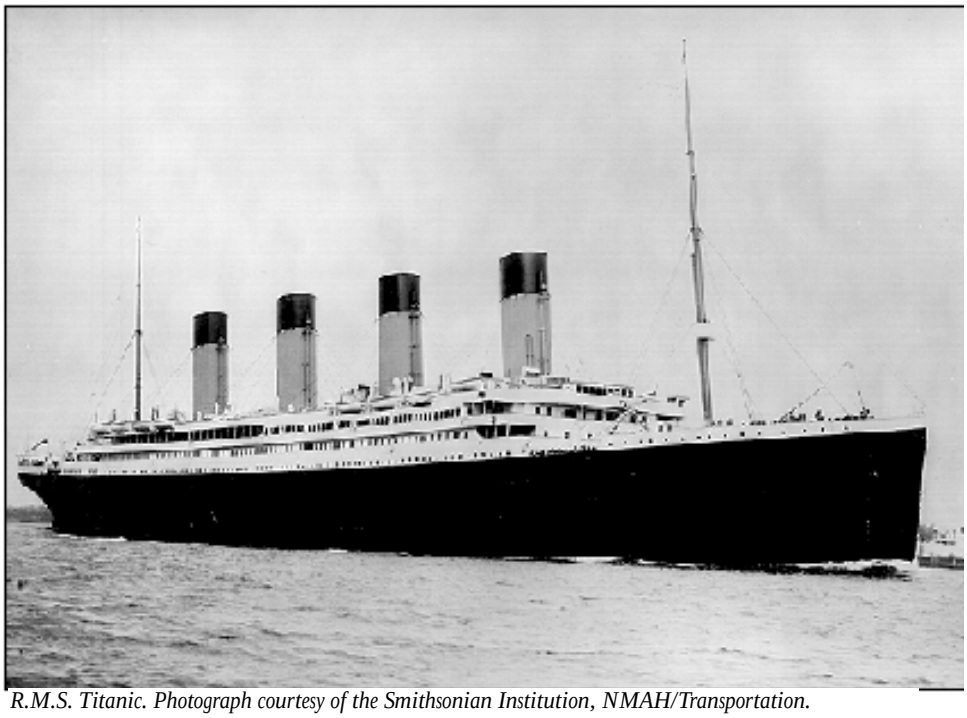
Court found that RMST overlooked "many of these basic principles of salvage and lien law" when it argued for its absolute right to salvage.[7]



R.M.S. Titanic. Photograph courtesy of the Smithsonian Institution, NMAH/Transportation.

Ownership vs. Possession

RMST further claimed that the court made no exceptions to RMST's ownership in the original declaration. The court ruled that because RMST only pursued salvage rights, it was not given title to the wreck in the court's original order. Even though the court used the term "ownership" in the original order, the court was plainly using salvage law when making its decision. Additionally, RMST repeatedly referred to itself as a salvor and understood the court's order to give it possession of artifacts for display, not authority to sell. Lastly, if RMST did want to sell the artifacts, it would have to gain title over them. To gain title, RMST would have to complete its salvage, have its reward determined, and only then enforce its liens on the artifacts. RMST did none of these necessary steps. Therefore, though RMST did have rights to salvage and possession, it never had ownership of the *Titanic* or its artifacts.[8]

Conclusion

The court therefore ruled that RMST did not have absolute ownership of the *Titanic* or any artifacts salvaged, but did have a right to possess the artifacts and place a salvage lien on them for possible future compensation.

ENDNOTES

1. A salvor-in-possession is someone who possesses property that he/she voluntarily saved at sea. R.M.S. Titanic *v. The Wrecked and Abandoned Vessel et al.*, 286 F.3d 194, 202 (4th Cir. 2002).
2. The court ruled that RMST was the "true, sole and exclusive owner of any items salvaged from the wreck...in the past and, so long as [RMST] remains salvor-in-possession, items salvaged in the future, and is entitled to all salvage rights . . . ." *Id.* at 197.
3. *Id.* at 198.
4. At the same time, the court ruled that RMST could sell any coal recovered from the *Titanic* wreck, as it wasn't considered an artifact.
5. The jurisdictional issues mainly focused around RMST's failure to appeal any of the court's earlier orders regarding sale of the artifacts. The court ruled that though RMST failed to appeal the court's earlier orders, because circumstances had changed and RMST was seriously considering selling artifacts as of the court's September 2001 order, the order had a new substantial effect and was therefore appropriate for appeal.
6. *Id.* at 201.
7. *Id.* at 206.
8. The court dismissed RMST's additional arguments without much discussion because they were dependent on RMST's assertion that it was given absolute title to the salvaged artifacts. RMST's arguments were that maritime law does not allow the court to impose restrictions on artifact disposition, RMST's statements concerning its intention to display the artifacts were not binding because they were only in the company's business plan, and restrictions on artifact sales inhibits salvage law by curtailing salvage operations.

The Tri-State Water Wars: An Interview with Trey Glenn, Division Director of the Alabama Office of Water Resources

Amanda M. Beard, 3L

The Apalachicola-Chattahoochee-Flint Compact (ACF) and the Alabama-Coosa-Tallapoosa Compact (ACT) were formed in 1997 by the states of Alabama, Georgia and Florida as a forum to reach an agreement on how the shared water resources of the three states should be allocated.[1] Despite years of negotiation, an agreement on water allocation has yet to be reached, therefore earning the water allocation process the nickname of "Tri-State Water Wars." With the next negotiation deadline set for January 31, 2003, Water Log contacted Trey Glenn, the Division Director of the Alabama Office of Water Resources, to find out what to expect from the latest round of ACF negotiations.

Water Log: Could you please provide us with some information on your department?

Glenn: The Office of Water Resources (OWR) was established in 1993 under the Alabama Water Resources Act as a division within the Alabama Department of Economic and Community Affairs (ADECA). ADECA is the primary planning and grants management agency for the State of Alabama and provides a natural fit for OWR. Through its legislative mandate, OWR is chartered with planning, coordination, development and management of Alabama's water resources, both ground and surface water in a manner that is in the best interest of the State of Alabama. The Act also specifically chartered OWR with the responsibility to negotiate on behalf of the state any interstate water-related issues.

Water Log: What exactly is your department's role in the ACF Negotiations?

Glenn: OWR provides technical support and advice to the Governor and the Alabama Negotiating Team. We work closely with counterparts in the other states and the federal agencies to ensure close coordination on technical issues and modeling approaches. OWR will also be the agency in Alabama responsible for the monitoring of any agreement and complying with any reporting provisions that may be established.

Water Log: What is the real issue behind the ACF negotiations?

Glenn: There is not one single issue behind this negotiation; rather a multitude of legal and technical perspectives. Simply put, Alabama wants to ensure there is an equitable allocation of the surface waters of the ACF Basin.

Water Log: What has happened in the process so far?

Glenn: This process began with a lawsuit by the State of Alabama against the U.S. Army Corps of Engineers in 1990. Since that time there has been a formal comprehensive study conducted by the States of Alabama, Florida and Georgia and the Corps of Engineers to look at both water availability and water demands. That led to the agreement to pursue interstate compacts in both the ACT and ACF Basins. Those compacts, passed under an agreement to develop the allocation formulas for each, are still being negotiated under extensions to the original deadlines. The current deadline in the ACF Compact is January 31, 2003.

Water Log: Who else is involved in the negotiation process?

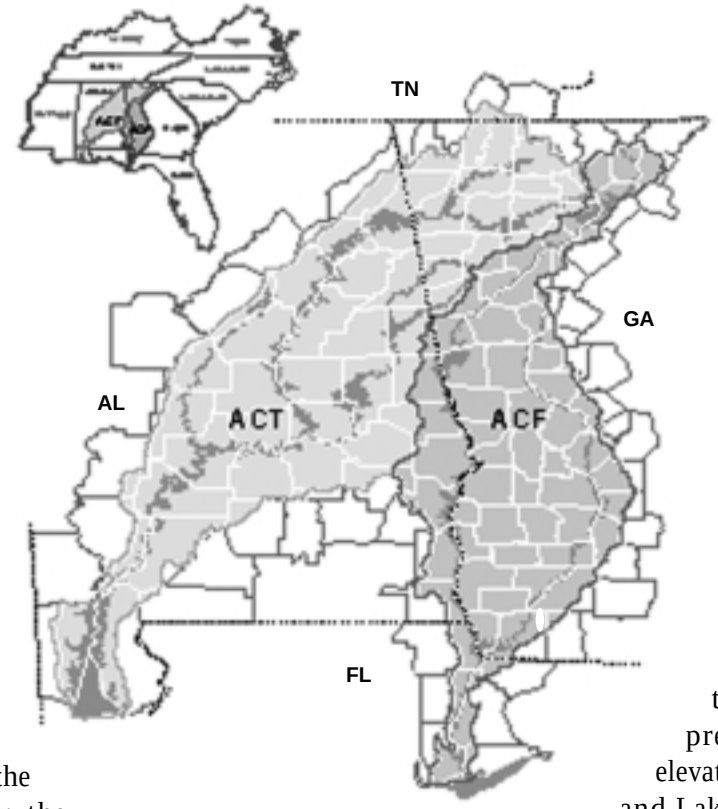
Glenn: Along with representatives from Alabama, Florida, Georgia, and the U.S. government, are a multitude of stakeholders including public and private groups, local and regional governmental organizations and individual citizens. There are processes by each individual state and the federal government to ensure that stakeholder inputs are encouraged. Negotiation meetings are heavily advertised and are all open to the public.

Water Log: Why have the ACF negotiations been so prolonged?

Glenn: As mentioned above, this process is complex because of numerous legal and technical issues. Those issues range from how to protect and preserve existing

and projected water uses, to maintaining the ecosystems, protecting water quality, how to best operate a complex series of reservoirs, and ensuring adequate streamflows to the downstream states. This requires extensive technical analysis and baseline information.

Alabama - Coosa - Tallapoosa (ACT)
and
Apalachicola -Chattahoochee-Flint (ACF)
River Basic Compacts



Map courtesy of Alabama Office of Water Resources

Water Log: What has been the major source of delay?

Glenn: There are a number of factors contributing to the length of this process. The complexity of the issues is probably the most significant. However, the technical analysis has required a great deal of close coordination. It has also taken time to establish the dialogue necessary to ensure that each state has articulated its position on various issues and to allow representatives of the federal government to express their views on various proposals.

Water Log: Why were the negotiations extended to January, 2003, a longer time period than the original 60-day time frame?

Glenn: In addition to the normal aspects of a complex negotiation, there are specific aspects relating to the updating of the unimpaired flow data set needed for the technical analysis and modeling issues involving specific reservoir operations and hydrologic assumptions. The longer extension should allow the time to complete the unimpaired flow data set and accomplish the modeling necessary to support the negotiations.

Water Log: What is Alabama's position in relation to that of the other two states?

Glenn: Alabama has been clear and forthright with our positions and objectives throughout the ACF negotiation. Those specific objectives include: adequate flows at Phenix City, Alabama and Columbia, Alabama; protections for waste assimilation and water resource permitting in the middle reach of the Chattahoochee River; assurance that authorized project purposes for the Corps' projects (i.e. hydropower, flood control, navigation) will be preserved; protections of elevations at West Point Lake and Lake Eufaula; and, finally, ensuring that aspects of the agreement and implementation, including COE operations and updated water control plans, do not adversely impact the goals listed above.

Water Log: What is the Governor's office involvement in the ACF negotiations?

Glenn: Governor Don Siegelman is Alabama's ACF Commissioner and has been very involved in this process. He has assigned key staff members to monitor the day to day progress in the negotiations as well as coordinating closely with the Alabama negotiators working on his behalf.

Water Log: What does the current negotiation process entail? Is it simply three separate proposals or is it a true negotiation process? In other words, how will a compromise ever be reached?

Glenn: The beneficial aspect of this process is that each state has had the opportunity to better understand the

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Mississippi's Newest Coastal Preserve

On Friday, May 24, 2002, the State of Mississippi officially assumed ownership of Deer Island, paying $15 million for 400 acres of undeveloped land. Another $1.8 million will be used to pay for other, smaller portions of the island, which are currently privately owned. The Trust for Public Land played an integral role in helping Mississippi acquire Deer Island. The group, a national nonprofit organization that facilitates land purchases for conservation, purchased the largest tract of Deer Island (about 92%), and then transferred management of the island to the state. The funds used to purchase Deer Island came from several sources. Governor Ronnie Musgrove signed a bill allowing the state to borrow $10 million towards the total $16.8 million purchase price. Other sources included $3.8 million in federal funds, $2 million from tidelands boundary settlements, and $1 million from the Commission on Marine Resources.

Photograph of Grand Bayou on Deer Island courtesy of Jeff Rester, Ocean Springs, Mississippi.

Deer Island, now part of Mississippi's 40,000 acre Coastal Preserves system, is administered by the Department of Marine Resources and the Secretary of State's office. The barrier island is located about one-half a mile off the southeast coast of Biloxi. Five major species of animals are supported by the island: the American Alligator, the Mottled Duck, Osprey, the Loggerhead Turtle, and the Diamond Terrapin. The island is also known to be a rookery for the Great Blue Heron. The unique location of Deer Island also provides feeding, resting, and wintering habitat for a number of migratory bird species, including the Brown Pelican.

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perspectives on water resources of each neighboring state. This has helped the parties in working together to resolve the remaining issues. However, each state still has a responsibility to its stakeholders to ensure that its position is clearly articulated to the others. As time has passed, we have been able to resolve many differences through the use of technical tools to develop a common understanding of the basin hydrology and decision impacts and how those impacts can be managed to best meet the various state and stakeholder needs across the ACF Basin.

Water Log: As the negotiation process continues, what are Alabama's current concerns? Have they changed as the process has been prolonged?

Glenn: Alabama's concerns for a fair and equitable allocation of these waters have not changed. The length of this process has shown the complexity of water resource decisions but it has not changed that basic mandate. It has also helped in the development of refined technical tools that can be applied to other areas of the state. This will help as we in Alabama look to ensure that effective statewide water resources management policies and processes are in place to support the needs of our citizens and our state.

ENDNOTES

1. For a detailed look at the Water Wars debate, *see* Shaw, *Sharing Water in Alabama, Georgia and Florida: An Update in the Tri-State Water Wars*, 21:2 WATER LOG, 10-11 (2001).

Pilotage, from page 1

waterway, and the land beneath the Gulf of Mexico up to three miles past its coastline, pursuant to the Submerged Lands Act. All of the CSC area is collectively referred to as the "Inner Bar" while the area of the CSC past the three-mile limit is referred to as the "Outer Bar."

The State of Louisiana hired boat pilots, the individual plaintiffs in this suit, to direct sea-going vessels through the CSC, into the Port of Lake Charles, and back out to sea again. Pursuant to an interpretation of existing Louisiana law, the pilots' duties extended to vessels in the Outer Bar as well as the Inner Bar. In fact, the Louisiana Supreme Court held that the Louisiana legislature intended to regulate the pilots' duties in the Outer Bar. Accordingly, the pilots filed the current action in Louisiana state court. They wanted the court to declare (1) that the State of Louisiana could not compel them to pilot ships outside of the state's three-mile territorial line; (2) that pilotage outside the three-mile boundary was an operation of the U.S. Coast Guard; and (3) that Louisiana's jurisdiction over the CSC ended at the three mile line.

The defendants immediately had the case removed to federal court based on federal question jurisdiction. There was, however, an issue as to whether one of the defendants filed consent to remove the case within the statutory, 30-day time frame. Essentially, the attorney for the Board of River Port Pilot Commissioners and Examiners (hereinafter "Board") filed a timely consent to remove, but did not have actual authority to do so until 39 days after the statutory deadline. There was also a question as to whether federal question jurisdiction truly existed. Because of these issues, the plaintiffs filed a motion to remand the case back to state court. Furthermore, both sides filed motions for summary judgment, asking the district judge to rule on the facts of the case. The U.S. District Court for the Middle District of Louisiana held that removal to federal court was appropriate and granted summary judgment in favor of the defendants. The pilots appealed to the Fifth Circuit.

Right to Regulate Navigation

The pilots argued that summary judgment should not have been granted for the defendants. Specifically, the pilots stated that when Congress enacted the Submerged Lands Act, it intended to prohibit Louisiana from controlling pilotage in the Outer Bar. Finding otherwise, the Fifth Circuit held that the Submerged Lands Act only deals with ownership rights and rights to natural resources in lands within the state's three-mile boundaries. Moreover, because the Submerged Lands Act never addressed pilotage or the right to control navigation, the pilots' belief that the Act controlled these activities was incorrect. Accordingly, the Fifth Circuit ruled that Louisiana's 3-mile boundary line did not affect the state's right to control navigation.

Second, the pilots pointed to 46 U.S.C. § 8501, which states: "pilots in bays, rivers, harbors, and ports of the [U.S.] shall be regulated only in conformity with the laws of the States." Because there is no particular reference to areas like the Outer Bay, the pilots argued that Congress must not have wanted the states to retain control over pilotage there. In its holding, the Fifth Circuit addressed the intentions of Congress when it enacted the Lighthouse Act of 1789. The language of the Act, which is practically identical to the language of § 8501(a), does not restrict a state's preexisting power over pilotage, unless otherwise stated by Congress. Because Congress has not indicated otherwise, the pilots' argument failed.

The pilots' final contention was that Louisiana's regulation of pilotage in the Outer Bar was at odds with federal interests in the same area. However, the Fifth Circuit again pointed to the fact that Congress has not regulated pilotage for more than 200 years. Furthermore, the waters of the Gulf of Mexico surrounding the Outer Bar of the CSC are extremely shallow. Louisiana has a justifiable interest in assuring safe travel to and from the Port of Lake Charles through these shallow waters. Accordingly, Louisiana may regulate pilotage in the CSC past its three-mile seaward territorial boundary.

ENDNOTES

1. 43 U.S.C. § 1312 (2002) (stating that the "seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line").
2. *CITGO Petroleum Corp. v. La. Pub. Serv. Comm'n*, 815 So. 2d 19 (La. 2002).

See Pilotage, page 13

Sunflower River, from page 1

affected areas, adversely affecting endangered mussel species.[1]

Under the Clean Water Act (CWA), a state has the authority to review federally permitted projects such as Big Sunflower to determine if they will affect the state's water quality.[2] When the Corps permitted the project, it certified that it did not degrade Mississippi's waters and initially, the DEQ agreed and granted water quality certification. The Sierra Club then filed suit challenging the DEQ's certification of the project. The Chancery Court upheld the certification, but the Mississippi Supreme Court reversed, requiring the agency to make adequate findings of fact and disclose the reasoning behind its decision. In 2002, the Chancery Court granted a rehearing on the case, finding that DEQ had adequately considered all necessary factors.[3] The Sierra Club appealed the Chancery Court's decision to the Mississippi Supreme Court.

Water Quality Analysis

The Sierra Club argued the DEQ failed to adequately consider several factors before granting water quality certification, including feasible alternatives to the project, mitigation, impact on Mississippi waters and the compliance history of the Corps. The DEQ certified the project without considering these impacts and without properly determining whether the Corps planned to take adequate measures to prevent unreasonable degradation and irreparable harms to Mississippi waters.[4] The court reviewed the DEQ's analysis relying on a previous holding that "it is a logical and legal prerequisite to intelligent judicial review . . . that the Board favor us with more than mere conclusory findings on each of these issues, together with a summary of the grounds for these findings."[5]

Feasible alternatives to the activity. The Environmental Protection Agency (EPA) and Fish and Wildlife Service (FWS) proposed a non-structural alternative to the project, which the Corps rejected as being too costly and ineffective. The Sierra Club contended that the Corps used faulty land values in its calculation of cost and demonstrated that the alternative would actually cost less than the proposed project. Nonetheless, the DEQ adopted the Corps' conclusions without explaining why. Relying on previous case law in which the court vacated an order of the State Oil and Gas Board for failure to make findings of fact and explain its decision-making, the court noted it could not review the case unless the DEQ adequately explained its findings and the reasons behind them.

Mitigation. The DEQ recognized the impact the project would have on waterfowl, wetland, terrestrial and aquatic resources, but found the Corps would adequately minimize these adverse impacts. The court noted the Corps did not specify what impacts were expected and how they would affect particular species and the environment and also declined to list exactly what mitigation measures the Corps considered. Again, the court determined the DEQ must make further findings before it could review the certification.

Impact on Mississippi waters. The court also found the DEQ failed to supply findings on the degree of physical, chemical and biological impacts the project would impose on state waters. While the DEQ did acknowledge considerable impacts, it did not "discuss what changes in chemical levels may be expected in the water or in the soil, or in aquatic and terrestrial life that depend on them, what species of plant and animal life may be affected, and to what extent, long term effects on wildlife populations. . . ."[6] The court decided DEQ must also analyze this factor on remand.

Compliance history of the applicant. The court stated that the DEQ made no findings regarding the Corps' record of mitigation and therefore the court required the DEQ to analyze the Corps' compliance history.[7]

Conclusion

The Court found the DEQ failed to make detailed findings of fact and analysis in granting certification to Big Sunflower. It vacated the judgment of Hinds County Chancery Court and the DEQ's order and remanded the case to the DEQ for reconsideration and further findings and analysis.

ENDNOTES

1. For a discussion of the court's first Big Sunflower Project decision, *see* Nowell, *Sierra Club Challenges the Big Sunflower River Project*, 21:2 WATER LOG 1 (2001).
2. The Corps certifies a project if it finds that the project will not unreasonably degrade or cause irreparable harms to a state's waters. Some factors used to grant or deny certification are the feasability of alternatives to the project, physical, chemical, and biological impacts, and alteration to the ecosystem. *See* 16 U.S.C. § 1341 (2002).
3. While the case was on appeal, the Mississippi Legislature changed the jurisdiction of water quality certifications from the DEQ to the Permit Board. In reviewing the case, however, the court determined the DEQ, rather than the Permit Board, was responsible for correcting any deficiencies in the determination.
4. The Department routinely denies certification when one of

the following criteria are met: the activity will alter the aquatic ecosystem and violate water quality or fail to support an existing use, there is a feasible alternative that has less adverse affect on water quality, the proposed activity negatively impacts waters containing threatened or endangered species, the activity adversely affects unique habitat, the activity adds to other activities to result in adverse cumulative impacts, there is a failure to propose non-point source and storm water management practices, there is a denial of state wastewater permits, or the proposed activity significantly impacts the environments, which may adversely impact water quality.

5. *Sierra Club v. Miss. Dept. of Envtl. Quality*, 819 So. 2d 515, 517 (Miss. 2002).
6. *Id.* at 524.
7. The court did rule that the DEQ had adequately addressed certain impacts on water quality, specifically pesticides, turbidity, suspended solids, and low dissolved oxygen. Despite the adequate analysis of these impacts, the court still held that, overall, the DEQ did not make enough detailed findings of fact and analysis to support the certification.

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3. Once a defendant receives a complaint for a state court cause of action, he or she has 30 days to file for removal to federal court. 28 U.S.C. § 1446 (2002). Anyone with authority to act on behalf of other defendants must also file some written indication that he or she consents to such removal, and must do so within the same time period. 28 U.S.C. § 1446(b) (2002).
4. In affirming the district court's ruling on removal to federal court, the Fifth Circuit held that because two of the three members of the Board gave authority to the attorney to file consent before the appropriate deadline and the entire Board eventually approved the attorney's actions, the attorney's actions were proper. Moreover, the Fifth Circuit followed Supreme Court precedent in holding that the pilot's claim for "injunctive relief from a state regulation, on the ground that such regulation is preempted by a federal statute," was a federal question. *Gillis et al. v. State of La.*, 294 F.3d 755, 760 (5th Cir. 2002).
5. 43 U.S.C. § 1312 (2002).
6. 46 U.S.C. § 8501(a) (2002).
7. *Gillis*, 294 F.3d 755, at 761-62 (*citing Wilson v. McNamee*, 102 U.S. 572 (1881)).

2002 Alabama Legislative Update

Amanda M. Beard, 3L and Magnolia Bravo, M.S., J.D.

The following is a summary of coastal, wildlife, marine, and water resources related legislation enacted by the Alabama Legislature during the 2002 session.

2002 Alabama Laws 59. (S.B. 29)
Approved January 31, 2002. *Effective October 1, 2003.*

Provides for the regulation of recreational vessel or residential boat sewage discharges and marine sanitation devices, by prohibiting the discharge of untreated sewage into the State of Alabama's waters and authorizing the Department of Conservation and Natural Resources to adopt rules and regulations to control and regulate the discharge of sewage from recreational vessels and residential boats. Every recreational vessel or residential boat with a marine sanitation device installed onboard and registered with the State of Alabama must be inspected annually. In addition, this legislation created a public education program designed to inform the public of the detrimental consequences of depositing untreated sewage, trash, litter and other materials into the waters of the state and the penalties for such actions. The Department of Conservation and Natural Resources will conduct the program.

2002 Alabama Laws 342. (H.B. 358)
Approved April 17, 2002. *Effective April 17, 2002.*

Modifies § 33-4-48 of the Alabama Code relating to the fees of bar pilots in the Mobile Bay and Harbor. Bar pilots must now be paid a flat fee of $27 per draft foot for any ship or vessel piloted within the Bay or Harbor plus between $.03 and $.0375 per ton for every vessel crossing the outer bar of Mobile Bay.

2002 Alabama Laws 357. (H.B. 182)
Approved April 17, 2002. *Effective October 1, 2002.*

Appropriates funds for the Coosa-Alabama River Improvement Association.

See Alabama Legislative, page 14

Alabama Legislative, from page 13

2002 Alabama Laws 373. (H.B. 185)
Approved April 17, 2002. *Effective October 1, 2002.*

Appropriates funds for the Tri-Rivers Waterway Development Authority, which is a non-profit organization promoting the effective development, utilization, and maintenance of the Apalachicola-Chatahoochee-Flint River Basin.

2002 Alabama Laws 374. (H.B. 187)
Approved April 17, 2002. *Effective October 1, 2002.*

Appropriates funds for the Waste Reduction and Technology Transfer Foundation for waste reduction, pollution prevention and technology transfer education services.

2002 Alabama Laws 429. (H.B. 551)
Approved April 18, 2002. *Effective April 18, 2002.*

Amends § 9-17-24 to require notice to and approval by the State Oil and Gas Supervisor prior to the fracture of any coal group. A fee must also be paid to the Supervisor prior to such action.

2002 Alabama Laws 495. (H.B. 493)
Approved April 26, 2002. *Effective April 26, 2002.*

Amends §§ 22-35-1, 22-35-3, 22-35-4, 22-35-5, and 22-35-8 of the Alabama Code to clarify the role of the Alabama Underground and Aboveground Storage Tank Trust Fund in the event of a release.

2002 Alabama Laws 505. (S.B. 271)
Approved April 26, 2002. *Effective July 1, 2002.*

Enacts the Farm Animal, Crop, and Research Facilities Protection Act to prohibit unauthorized alteration, possession or destruction of agriculturally-related animals or crops or educational or scientific research related to animals and crops.

2002 Alabama Laws 507. (H.B. 166)
Approved April 26, 2002. *Effective October 1, 2002.*

Appropriates funds for the Gulf Coast Exploreum Science Center and the North Alabama Science Center through the State Council on the Arts, to support programs promoting the arts and cultural resources.

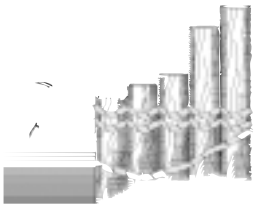
2002 Alabama Laws 510. (S.B. 235)
Approved April 26, 2002. *Effective July 1, 2002.*

Amends § 9-2-13 to authorize the Commissioner of Conservation and Natural Resources to prohibit the importation of certain animals, birds, reptiles, amphibians, and fish if that importation would not be in the best interests of the state. This section does not apply to birds, animals, reptiles, amphibians, and fish used for display purposes in carnivals, zoos, circuses, or other like shows where there is not a likelihood of escape or release in the state.

2002 Alabama Laws 521. (H.B. 456)
Approved April 26, 2002. *Effective April 26, 2002.*

Amends §§ 34-21A-2 and 34-21A-12 of the Alabama Code to provide further regulation of onsite sewage wastewater systems. The definition of "onsite wastewater system" was amended to include all systems of sewage piping, regardless of where they originate and a fourth type of sewage servicing license was added, a pumper license, for those involved in pumping, cleaning, or maintenance of onsite wastewater systems.

Lagniappe *(a little something extra)*



Around the Gulf . . .

Alabama's agricultural commissioner, Charles Bishop, recently banned the sale of six packaged shrimp products using imported chinese shrimp, after it was found that they contained small amounts of the antibiotic chloramphenicol. The drug was banned from U.S. agricultural products after it was found to cause both leukemia and aplastic anemia.

A federal judge has ruled that President Bush's administration failed to create adequate sanctuaries for Florida's endangered manatees, violating the settlement reached last year with various private groups. The private groups argued that the protections were delayed so as to avoid the issue during the Governor Jeb Bush's election year. Governor Bush stated that he requested the delays to allow Florida to expand their own protections first. The court ruled that no delay was allowed under the settlement. The Court ordered the Fish & Wildlife Service to submit a proposal by July 15 to remedy the situation.

Around the Nation . . .

California Governor Gray Davis recently signed a law requiring all residential clothes washers in California to be at least as water efficient as commercial washers starting in January 2007. The law makes California the first state to mandate water efficiency standards and proponents estimate that the law could result in a savings of about 1 billion gallons of water annually. The U.S. Department of Energy estimates that the new standards will raise the average cost of a washing machine by about $250 annually.

Whitney Houston was issued a summons for violating water-use restrictions at her New Jersey estate after police found sprinklers running on her property. State officials imposed water-use restrictions last month because of continuing drought conditions and have banned residents from washing cars and watering lawns. Persons violating the restrictions can face fines of up to $1000.

Around the World . . .

Norweigan officials have barred people from getting near Keiko, the killer whale who starred in the "Free Willy" movies. Six weeks after being released from Iceland, he was spotted in a western Norweigan fjord, where crowds have been trying to feed him, pet him, swim with him and even climb on his back. Despite Keiko's friendliness, officials are worried that his continued contact with humans will prevent him from learning how to hunt for food on his own. Police will fine anyone who violates the ban.

WATER LOG (ISSN 1097-0649) is supported by the National Sea Grant College Program of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration under NOAA Grant Number NA16RG2258, the Mississippi-Alabama Sea Grant Consortium, State of Mississippi, Mississippi Law Research Institute, and University of Mississippi Law Center. The views expressed herein do not necessarily reflect the views of any of those organizations. 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. Graphics and/or photographs by ©Corel Gallery, © Nova Development Corp., the Smithsonian Institution, NMAH/Transportation, The Alabama Department of Water Resources and Larry Rester.

MASGP-02-002-02
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Upcoming Conferences

NOVEMBER, 2002

Symposium on Effects of Fishing Activities on Benthic Habitats: Links Geology, Biology, Socioeconomics, and Management
http://walrus.wr.usgs.gov/bh2002
November 12-14, 2002, Tampa, St. Petersburg, FL

Brownfields 2002
http://www.brownfields2002.org
November 13-25, 2002, Charlotte, NC

Carnivores 2002: From the Mountains to the Sea
http://www.defenders.org/carnivores2002
November 17-20, 2002, Monterey, CA

Fuel Choices for the Power Industry: Supply, Economics and Environmental Constraints
http://www.emlf.org
November 18-19, 2002, Charleston, SC

101st Annual Meeting of the American Anthropological Association
Enclosing the Marine Commons: Marine Protected Areas and the Role of Anthropology
http://www.aaanet.org/mtgs/mtgs.htm
November 20-24, 2002, New Orleans, LA

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