

# WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Volume 18:1 1998



## Horn Island Owner Prevails in Fifth Circuit

Beggerly v. United States, 114 F.3d 484 (5th Cir. 1997).

*Kristen M. Fletcher, J.D.*  
*Jason McCormick, 2L*

### Overview

The Fifth Circuit Court of Appeals reversed a district court decision and ruled that Clark Beggerly has valid title to 729 acres of Horn Island previously claimed by the National Park Service. Horn Island is one of the barrier islands in the Gulf Islands National Seashore, managed by the Fish &

Wildlife Service and the National Park Service for years as a wilderness and recreation area.

Beggerly and the Park Service have disputed ownership of the island since 1975. In 1991, Beggerly found evidence supporting his claim to Horn Island and sued the government for title or compensation. A federal district court dismissed the suit in favor of

the government. The Fifth Circuit reversed, remanding the case to the district court to quiet title in favor of Beggerly. The Fifth Circuit decision gave the United States the option of delivering title of the land to Beggerly or paying just compensation. The U.S. Supreme Court granted certiorari in January.<sup>1</sup>

*see Horn Island pg. 3*

## Eleventh Circuit Defines "Adjacent Wetlands"

United States v. Banks, 115 F.3d 916 (11th Cir. 1997).

*Elizabeth B. Speaker, 2L*

### Introduction

In June 1997, the Court of Appeals for the Eleventh Circuit affirmed a lower court decision holding that lands located in the Florida Keys which are connected to navigable waters merely by groundwater are adjacent wetlands under the Clean Water Act (CWA). The court also determined that the defendant, Park Banks, violated the CWA by filling the wetlands on several lots he owned on Big Pine Key. Despite Banks' arguments that the government erred in claiming

jurisdiction over his lands, the Eleventh Circuit determined that a connection primarily through groundwater, surfacewater, and ecological factors is sufficient to qualify as adjacent wetlands.<sup>1</sup> Banks appealed the decision but the United States Supreme Court denied review in January, 1998.<sup>2</sup>

### Facts

The CWA authorizes the U.S. Army Corps of Engineers (Corps) to issue permits for discharges of fill material into waters of the

United States, including wetlands. In 1980, defendant Park Banks purchased several lots in Big Pine Key, Florida. Banks immediately began bulldozing and filling two of the lots without Corps permits. Banks also altered the land to begin coconut farming and built a house. In March, 1983, the Corps warned Banks that discharges into his lands were unlawful without a permit.<sup>3</sup> Banks continued discharges resulting in a cease and desist order issued by the Corps in April and a threat of an enforcement action against Banks. Banks

*see Wetlands pg. 5*

## In This Issue...

<b>Horn Island Owner Prevails in Fifth Circuit</b> .....	<b>1</b>
<b>Eleventh Circuit Defines "Adjacent Wetlands"</b> .....	<b>1</b>
<b>Antarctica Treaty Purports to Protect Ocean</b> .....	<b>7</b>
<b>U.S. Navy Departs Antarctic Program After 42 Years</b> .....	<b>9</b>
<b>The Red Snapper Fishery: High Stakes in Limited Entry</b> .....	<b>10</b>
<b>Book Review: OIL CRISIS IN OUR OCEANS</b> .....	<b>12</b>
<b>Presidential Proclamation</b> .....	<b>14</b>
<b>Lagniappe</b> .....	<b>15</b>



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, Lamar Law Center, Room 518, University, MS, 38677, or contact us via e-mail at: [waterlog@olemiss.edu](mailto:waterlog@olemiss.edu). We welcome suggestions for topics you would like to see covered in WATER LOG.

*Editor:* **Kristen M. Fletcher, J.D.**

*Editor at Large:* **John A. Duff, J.D., M.A., LL.M.**

*Publication Design:* **Dawn M. Jeter**

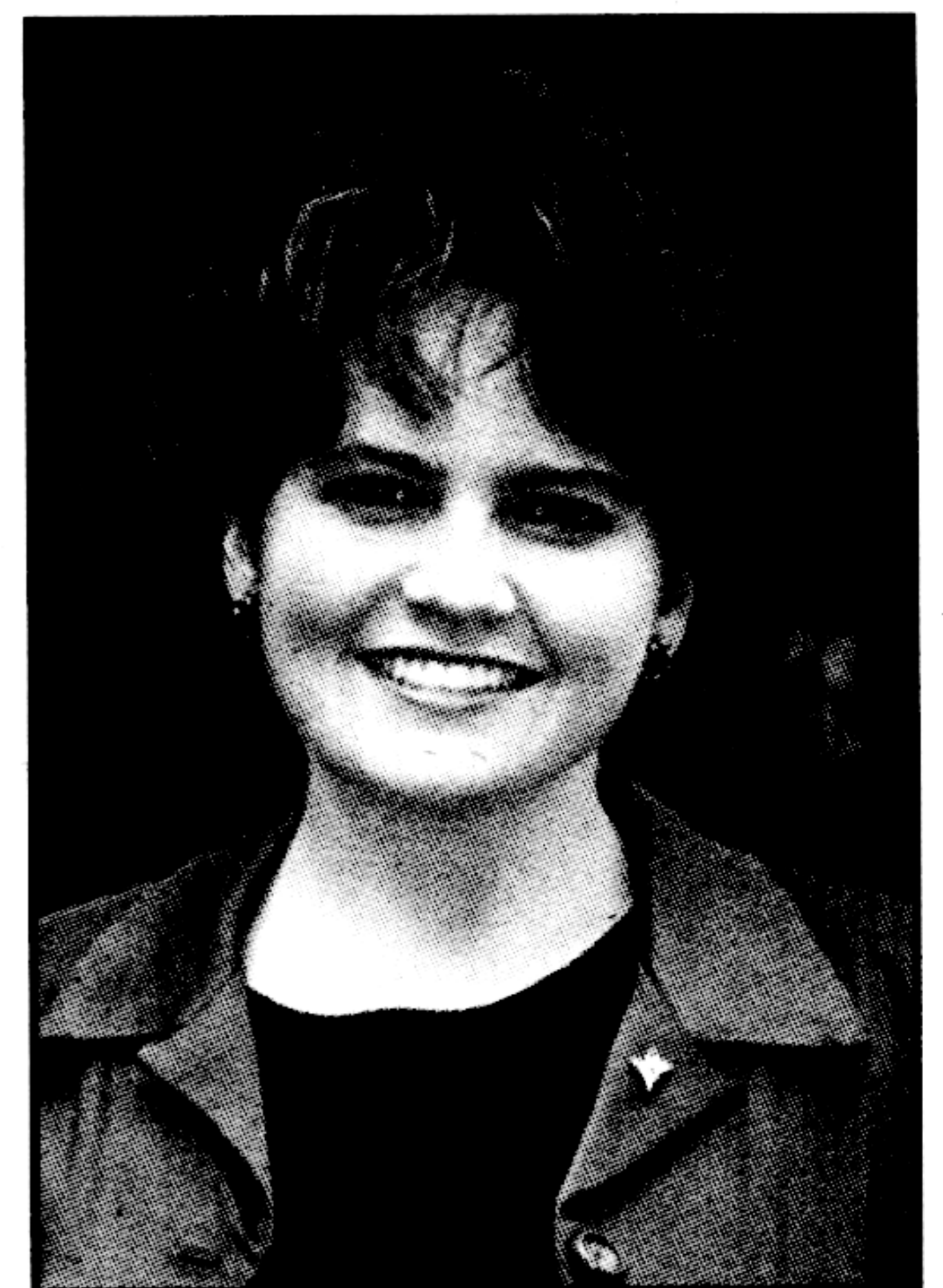
*Policy Assistant:* **Ashley Amos, 2L**

*Research Associates:*

**Lanny Acosta, Jr., 3L**   **Rebecca Jordan, 2L**  
**Jason McCormick, 2L**   **Elizabeth B. Speaker, 2L**  
**Tim Wilson, J.D.**

## From the Editor's Desk...

*I joined the Mississippi-Alabama Sea Grant Legal Program last summer and began working on WATER LOG as Associate Editor. With this issue, I take over as Editor and hope to provide the same vision and leadership which has made WATER LOG a leader in legal reporting over the last two decades.*



*As we enter our 18<sup>th</sup> year, the WATER LOG staff recognizes the challenges that await us. Our focus will remain the same: to inform our readers of ocean and coastal law issues affecting Alabama, Mississippi, the Gulf of Mexico, and our nation. Yet, we are lucky to be at the forefront of progressive developments in ocean and coastal law. In 1998, the International Year of the Ocean, we celebrate our past conservation efforts but recognize the need for greater understanding, sharing of information, and reporting of legal issues involved in managing the oceans of the world. As a result, we recognize that our duty to report to you has become even more important.*

*We encourage you to let us know your thoughts on WATER LOG and its contents, and welcome suggestions for topics or articles of your own. You can now access back issues of WATER LOG and e-mail us your comments on the Legal Program web site located at [www.olemiss.edu/pubs/waterlog/](http://www.olemiss.edu/pubs/waterlog/) or write us at:*

**WATER LOG**

**Lamar Law Center, Room 518  
 University, MS 38677**

*We look forward to hearing from you and working with you in the future.*

*Sincerely,*

*Kristen Michele Fletcher*

Kristen Michele Fletcher, Editor

*Horn Island continued from pg. 1***History of Horn Island**

Horn Island is a barrier island located in the Gulf of Mexico approximately fourteen miles south of Ocean Springs, Mississippi. Marshes and small ponds flourish in the island's interior. Horn Island also provides important habitat and nesting areas for water fowl, reptiles, and the endangered red wolf.<sup>2</sup> Along the northern shoreline of Horn Island lies the brackish water of the Mississippi Sound which constitutes vital habitat for many important commercial species of fish and shrimp.

**The Beggerly Claim**

This unique natural setting of the island has attracted visitors for many years. The first continuous inhabitants of Horn Island were the Waters family between 1845 and 1920. In 1943, the Department of the Army maintained a small unit on the island. In 1950, Clark Beggerly bought 729 acres of Horn Island at a sheriff's tax sale in Jackson, Mississippi, paying \$70 in delinquent taxes to acquire the property.

In 1971, when Congress designated Horn Island as an island in the Gulf Islands National Seashore, the government initially offered Beggerly a settlement for title to the 729 acres. In 1975, the government backed out of the contract. It argued that Beggerly could not have purchased an interest in Horn Island at the tax sale because no portions of Horn Island

were ever privately owned.

In 1979, the government brought a quiet title action against Beggerly.<sup>3</sup> During the course of this proceeding, the government represented that a search of the public land records revealed no land grants transferring the ownership of Horn Island into private hands. During the 1500s - 1700s, land grants by England, France, and Spain to citizens in what are now the states of Louisiana, Mississippi, Alabama, and Florida were common. Based on the government representation, Beggerly agreed to convey this interest in Horn Island in exchange for a settlement of \$208,000.

Displeased with the result of the settlement after many years, in 1991, Beggerly hired a genealogical record specialist to conduct research in the National Archives, the same source the government researched years earlier. The specialist uncovered the existence of the Boudreau Grant, a 1781 Spanish land grant which conveyed Horn Island to Catarina Boudreau by the Governor General of Spanish Louisiana. The Boudreau Grant established a chain of private ownership dating prior to the Louisiana Purchase, strengthening Beggerly's ownership claim.

In 1994, Beggerly brought this action requesting that the federal district court quiet title in his favor or award him just compensation for the acreage.<sup>4</sup> The government filed a motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted. The United States District Court for the Southern District of

Mississippi granted the government's motion to dismiss and never heard the merits of the case. Beggerly timely appealed and the Fifth Circuit Court of Appeals reviewed the decision of the district court and the merits of the title claim.

**Fifth Circuit's Holding***Sovereign Immunity*

The government argued to the Fifth Circuit that sovereign immunity barred Beggerly from proceeding with an independent quiet title action. The government claimed that because a claimant cannot bring an action to vacate a prior judgment obtained by the United States, then Beggerly was precluded from suing the government over its judgment regarding title of Horn Island. The court disagreed and found that Beggerly's claim is an independent action and that federal rules allow a court to hear such actions.

The court also recognized that Beggerly's claim against the United States was a continuation of the original lawsuit brought by the government in 1979. Because the government had waived its immunity from suit when it brought its original quiet title action against Beggerly, it could not use sovereign immunity to avoid suit now. The Fifth Circuit explained that it would "do unacceptable violence to our basic notions of justice" to allow the government to use sovereign immunity as a shield when it prevailed in the action based upon its misrepresentations.<sup>5</sup>

### *Validity of the Boudreau Grant*

The Fifth Circuit then determined that the district court erred in not dismissing the consent decree which gave title of Horn Island to the government. The Fifth Circuit found that the validity of the Boudreau Grant makes the consent decree invalid. If the consent decree stands, then the decision will give the government the authority to confiscate property rightfully owned by private individuals.

In its analysis of the grant, the court recognized the well-settled law that, absent a specific congressional act, land validly granted by a foreign nation remained privately owned after the United States acquired political control of the area. Thus, if the Boudreau Grant was in fact a valid land grant under Spanish law at the time it was made, Horn Island would have remained privately owned after the area fell within the borders of the United States.

To determine the validity of the grant, the court turned to the affidavit of an expert witness, which evaluated the Spanish law in question and deemed the Boudreau Grant valid.<sup>6</sup> The court concluded that the Horn Island property remained privately owned after the Louisiana Purchase and "did not enter the public domain until the consent judgment of 1982."<sup>7</sup>

### *Statute of Limitations*

Finally, the government argued that the statute of limitations had run on the quiet title action because

Beggerly waited twelve years before filing suit for title. In rejecting this position, the Fifth Circuit declined to strictly adhere to the statute of limitations law. Instead, the court extended the statute of limitations because Beggerly had been actively misled by the government's 1982 assertion that there were no land grants affecting Horn Island.

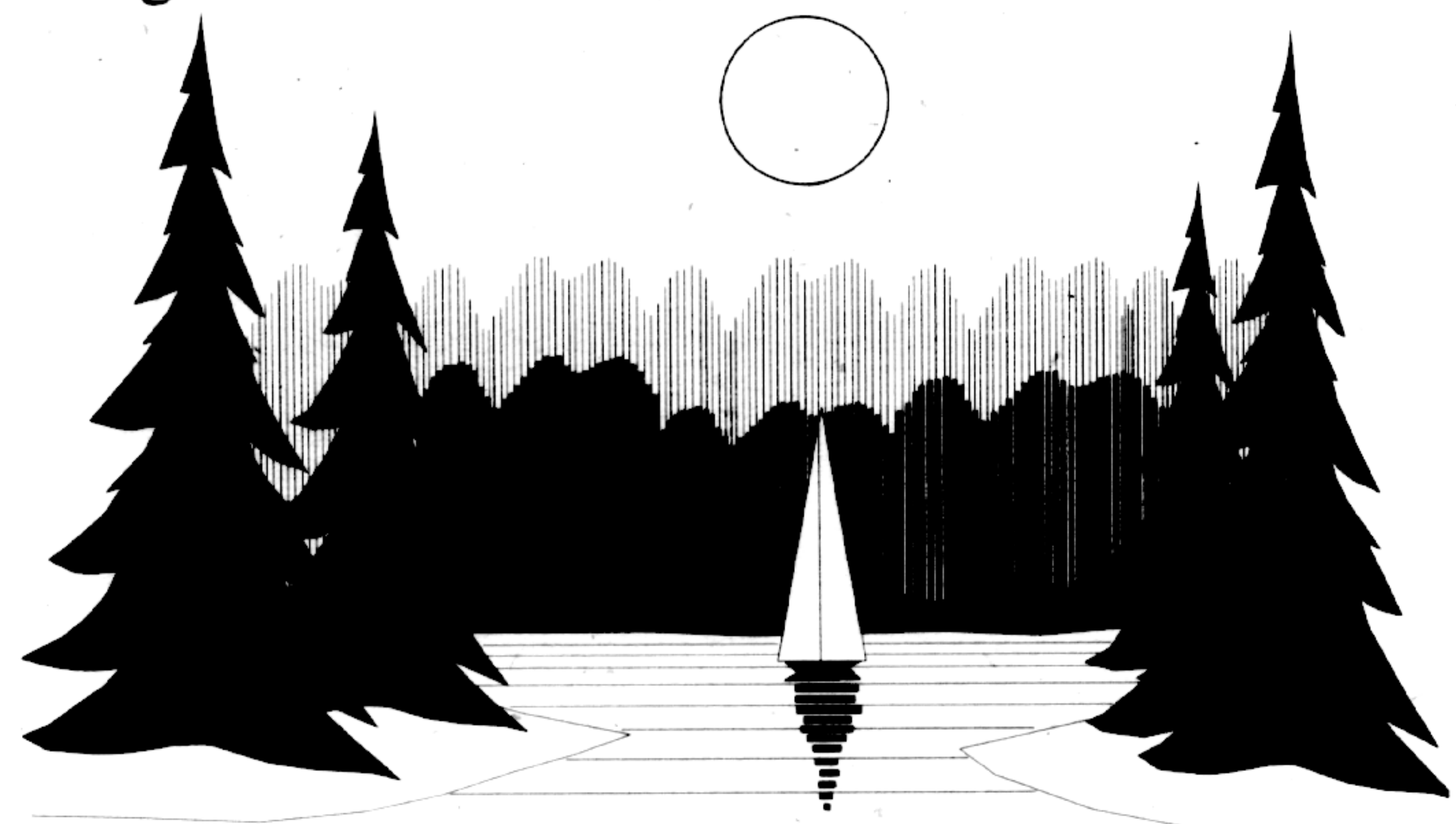
The court relied upon "equitable tolling" to continue the Beggerly action because the government prevented Beggerly from asserting his rights. The court concluded that due to Beggerly's diligent search, the limitations period was tolled from the time Beggerly began searching for evidence of a private ownership of Horn Island until they discovered the Boudreau Grant.

### **Conclusion Supreme Court Review**

The court remanded the case to the district court to quiet title in favor of Beggerly. In reaching this decision, the court noted that pursuant to federal statute, the United States had the option of either delivering possession of the land to Beggerly or retaining possession and paying Beggerly just compensation. The United States appealed this decision.

On January 9, 1998, the Supreme Court decided to review the Fifth Circuit's decision. By reviewing the procedural questions at hand, the Court will determine the ownership of Horn

Island. If the Supreme Court upholds the Fifth Circuit's decision, then Beggerly has legal claim to the island. The government will have to determine whether to pay Beggerly just compensation for the land or lose 729 public acres of untouched barrier island habitat. This unique piece of property, touted as one of the most important conservation achievements on the gulf coast, may be worth as much as \$10 million.<sup>8</sup> ✓



### **ENDNOTES**

1. *Beggerly v. United States*, 114 F.3d 484 (5th Cir. 1997), cert. granted, 118 S.Ct. 679 (U.S. Jan. 9, 1998) (No. 97-731).
2. See Melissa Baria, John Duff, *The Barrier Islands of Mississippi and Alabama*, 15:3 WATER LOG 7 (1995).
3. The United States brought action against Beggerly and other property owners. See *United States v. Adams*, No. S79-0338(R) (S.D. Miss. Dec. 3, 1982).
4. *Beggerly v. United States*, No. 1:94-CV-264RR (S.D. Miss 1994).
5. 114 F.3d at 487.
6. *Id.* at 488.
7. *Id.*
8. Bill Voelker, *Brothers Seek Pay Dirt in Island Fight*, TIMES PICAYUNE, Sept. 14, 1997, A1 (quoting Oliver Houck).

**Wetlands continued from pg. 1**

applied for the after-the-fact permit but was denied. The Corps stated that in order for Banks to avoid an enforcement action, he must negotiate a restoration plan. Banks continued discharging without such a plan and even bought two more lots and continued clearing and filling the lands in 1988.

As a result, the Corps issued another cease and desist order noting Banks' lack of a permit and continued discharge "despite clear notice that conduct was illegal."<sup>4</sup> In December of 1991, the government filed suit against Banks requesting an injunction, restoration of wetlands, and a civil penalty. The District Court for the Southern District of Florida found for the government and Banks appealed to the Eleventh Circuit. Banks' appeal was based on the following arguments.

**Jurisdictional Wetlands**

Banks first claimed that the Corps did not have jurisdiction over his lands because they did not meet the proper definition of "wetland." The CWA defines wetlands as areas "inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."<sup>5</sup>

Banks contended that his properties were not wetlands for two reasons. First, Banks argued that the Corps' use of the 1989 version of the Wetlands Delineation Manual was improper because

Congress ultimately banned its use. The 1989 Manual expanded the list of lands included as wetlands, including Banks lands among them. The court held that at the time the Corps determined Banks' land to be wetlands, Congress had not yet banned the 1989 Manual. Thus, the court found that the Corps had properly used the 1989 Manual's guidelines which include Banks' lands as wetlands.

Banks' second argument was that if the Corps has used the 1987 Manual, his lands would not have been classified as wetlands. Banks claimed that his lands did not meet the criteria for wetlands since they had little to no hydric soils. Under the 1987 Manual, there are three criteria which land must meet to be categorized as wetlands. The land must have a prevalence of hydrophytic plants, hydrological conditions suited to such plants, and hydric soils.<sup>6</sup> Banks contended that his lands did not qualify as wetlands under the 1987 Manual, since they were covered by caprock limestone in several areas and had very little soil.<sup>7</sup> The government presented several experts to show that the soils present were hydric, especially before Banks filled them. This testimony was sufficient to convince the district court that Banks' land would have also met the criteria for wetlands under the 1987 Manual.

**Adjacent Wetlands**

Banks then disputed the district court finding that his lots were "part of a meandering wetland slough traversing Big Pine Key to

Pine Channel on the west and Bogie Channel on the east."<sup>8</sup> Banks argued that even if the court determined that his lands were "wetlands," they are isolated wetlands because they are at least one half mile from either of the navigable channels with no hydrological relationship with these waters. He gave evidence of this disconnection by showing that a paved road blocks water flow between the lots and the navigable waterway, Bogie Channel. If Banks had proven that his wetlands were isolated, he could have filled some areas of his lands under a general permit, saving the time and expense of applying for an individual permit.<sup>9</sup>

The government argued that Banks' lands were "adjacent wetlands" rather than isolated ones. The CWA defines the term "adjacent" as "bordering, contiguous, or neighboring."<sup>10</sup> The government offered evidence of a hydrological connection through groundwater and through surface water during storms. They also presented evidence of ecological links between the areas based on the wildlife habitats to prove adjacency.

The court revisited its 1983 holding in *United States v. Tilton* to determine the necessary connection between Banks' lands and the channels to meet the standard for adjacency. The Eleventh Circuit held in *Tilton* that a sufficient hydrological connection could exist through groundwater and surface water which connected only during hurricanes.<sup>11</sup>

The district court determined Banks' wetlands were adjacent for two reasons. First, the district court relied on the discussion of

ecological adjacency in *Tilton*, noting the role wetlands play in the food chain as habitats for fish, birds, turtles and other wildlife.<sup>12</sup> Banks' lands provided the same type of habitats as the lands in *Tilton*. The district court relied on the hydrologic and ecological adjacency standards set forth in *Tilton* and determined Banks' lands were adjacent wetlands.

Second, the district court relied upon federal regulations which state that man-made barriers or dikes separating wetlands from other waters of the United States do not defeat adjacency. Thus, Banks' argument that separation of his lands from the channels by a paved road was inadequate.<sup>13</sup> The Eleventh Circuit found no clear errors in the district court's characterization of Banks' land as part of one contiguous wetland and upheld the determination that the wetlands are adjacent for purposes of Corps regulation.

### Nationwide Permit 26

Finally, Banks argued that his activities were already permitted through a regional permit known as Nationwide Permit 26 (NWP 26), which permits discharge of a small amount of material into certain waters if they are not connected to interstate or navigable waters. If the court determined that Banks activities were already permitted then the government would have no cause of action against Banks.

The Corps expanded the scope of authorized discharges in 1982 but retracted this expansion in 1991. Banks argued that his discharge activities occurring between 1982 and 1991 were with-



in the scope of NWP 26. The Corps rebutted Banks' argument with proof that the Corps has always included wetlands adjacent to navigable waters in the term "surface tributary system." The government noted that the Corps has consistently required individual permits for fills into adjacent wetlands because they are part of the surface tributary system.

The court noted that the Corps consistently construed Banks' activities to be outside the scope of NWP 26 both in 1983 when it informed Banks that his activities required a permit and in 1984 when it denied Banks' application for an after-the-fact permit. In holding for the United States, the Eleventh Circuit stated that the Corps' interpretation of its own regulation is entitled to substantial deference.

### Conclusion

In *U.S. v. Banks*, the Eleventh Circuit affirmed Banks' violation of the Clean Water Act and reaffirmed the Corps' jurisdiction over

wetlands that have a connection to navigable waters through groundwater. The Supreme Court's denial of review affirms that in the states of Alabama, Florida, and Georgia, a connection via groundwater, surface water, and ecological necessity is sufficient for the purpose of establishing adjacent wetlands.<sup>14</sup> ✓

### ENDNOTES

1. *United States v. Tilton*, 705 F.2d 429 (11th Cir. 1983); see also *United States v. Lambert*, 589 F.Supp. 366, 371 (M.D.Fla. 1984) where a District Court used the *Tilton* standard for adjacency.
2. *Banks v. United States*, 1998 WL 15443 (1998).
3. *United States v. Banks*, 873 F.Supp. 650, 654 (S.D.Fla. 1995).
4. *Banks v. United States*, 115 F.3d 916, 918 (11th Cir. 1997).
5. 33 C.F.R. § 328.3(b) (1995).
6. The three criteria which wetlands must meet under the CWA as set out in the 1987 Wetlands Delineation Manual are (1) prevalence of hydrophytic plants, (2) hydrological conditions suited to such plants, and (3) the presence of hydric soils. *Delineation Manual* 18-19 (1987).
7. *United States v. Banks*, 873 F.Supp. at 655.
8. *Banks*, 115 F.3d at 920.
9. *United States v. Banks*, 873 F.Supp. at 658. *O'Conner v. United States Army Corps of Engineers*, 801 F.Supp. 185, 190-191 (N.D.Ind. 1992).
10. 33 C.F.R. § 328.3(c) (1995).
11. *Tilton*, 705 F.2d at 431.
12. *Id.*
13. 33 C.F.R. § 328.3(c) (1995).
14. The Eleventh Federal Judicial Circuit consists of Alabama, Georgia and Florida.

# Antarctica Treaty Purports to Protect Ocean

*Kristen Fletcher, J.D. and Tim Wilson, J.D.*

## I. Introduction

The Madrid Protocol on the Protection of the Antarctic Environment took effect on February 14.<sup>1</sup> Signed in 1991, it took effect when the 26 member nations ratified it. The Protocol is part of the larger Antarctic Treaty System which was created "to ensure that Antarctica is used for peaceful purposes, for international cooperation in scientific research, and does not become the scene or object of international discord."<sup>2</sup>

The Protocol purports to protect the Antarctic Ocean. It provides rules for waste disposal at sea, requires environmental impact statements for proposed activities, designates Antarctica as a natural reserve, and bans mining. Unfortunately, its effectiveness is limited by unclear terms, lack of adequate enforcement, and provisions allowing exemptions from its requirements.

## II. The Antarctic Treaty System & the Madrid Protocol

Since 1959, the conduct of nations in Antarctica has been regulated by the Antarctica Treaty System, which consists of the Antarctica Treaty of 1959 and several subsequent treaties. The primary goal of the 1959 treaty was to demilitarize Antarctica. Environmental protection did not become a goal of the treaty system until the 1970s.

The 1991 Protocol does not

materially reduce the rights of states claiming sovereignty in Antarctica, but it does provide a holistic approach to the regulation of the Antarctic environment and a means of gathering information and providing disclosure of the activities of nations in Antarctica which includes greater attention to the Antarctic Ocean.

### *Disposal in the Ocean*

An Annex to the Protocol provides rules for the disposal of waste on land and at sea.<sup>3</sup> A party may not discharge oil, noxious liquids, garbage or sewage into the sea and all vessels operating in the area must be equipped with retention tanks. An important exception is whenever a requirement might impair an Antarctic operation. Unfortunately, the Annex fails to define "impair" and may represent an open invitation to abusive interpretation by vessel operators.

This requirement also does not apply to ships owned and operated by a State and used for noncommercial purposes. Most ships in the Antarctic are owned by a State and very few are used for commercial purposes, leaving the Antarctic Ocean little protection under this provision.

### *EIS Requirement*

The most important parts of the Protocol are the requirement of environmental impact statements for all activities in the Antarctic

treaty area, including the related oceans and ice caps.<sup>4</sup> It also requires that all Antarctic activities be conducted so as to limit environmental damage. The purposes of the environmental impact statements are to provide information for informed decisions about Antarctic activities and to provide disclosure to all nations of activities in the Antarctic.

In addition, the Protocol bans activities likely to harm the environment of the Antarctic. The Protocol does not define or give examples of these activities so it is hard to determine exactly what is forbidden. It does ban activities that knowingly cause a risk to the environment but does not forbid activities where the risks to the environment are unknown.

The Protocol requires nations to cooperate in the planning and conduct of Antarctic activities and, "to the extent possible," to share information and to "endeavor" to assist each other in the preparation of environmental impact statements. Customary international law imposes an obligation on nations to cooperate in mitigating transboundary environmental risks. However, the Protocol adds specific obligations to gather and disclose environmental data. This obligation applies to a wide variety of activities, including scientific research and tourism. This obligation reflects the lowest common denominator of responsibility the Parties were willing to have apply to all types of activity.

*cont.*

### *Antarctica: A Natural Reserve*

The 1991 Protocol to the Antarctica Treaty of 1959 obligates the Parties to protect the Antarctic environment and the dependent ecosystems by designating Antarctica a "natural reserve." There is no definition of the term "natural reserve" or specific rights or duties resulting from the use of that term. The term was provided by Australia and France, who objected to the terms "wilderness park" or "common heritage" because those terms had clearly defined meanings in international law and implied a reduction in sovereign rights.<sup>5</sup> This leaves the designation more symbolic than legal.

### *The Ban of Mining*

The Protocol also contains a purported ban on Antarctic mining. It is a compromise between states asserting sovereign rights (primarily Australia and France), states worried about exclusion from the development of Antarctic resources, and nongovernmental environmental groups worried about damage to the Antarctic environment. The Protocol states that "[a]ny activity relating to mineral resources, other than scientific research, shall be prohibited."<sup>6</sup> However, this prohibition is not as absolute as it sounds. First, scientific research may be used as an excess to prospect for minerals. Second, parties may use an amendment procedure to conduct mining.

The Protocol may be amended at any time by agreement of a

majority of the Parties.<sup>7</sup> An amendment relating to mining must contain "an agreed means for determining whether and under what conditions, any such activities would be acceptable."<sup>8</sup> The amendment should fully safeguard the rights of a Party that claimed sovereignty over any part of Antarctica at the time the original Antarctica Treaty of 1959 came into force.<sup>9</sup> The amendment process has no requirements relating to environmental protection, weakening the ban.

Finally, a "walk away" clause permits a nation to withdraw from the protocol if an amendment to the protocol, including an amendment to the ban on mining, has not been adopted within three years of being proposed.<sup>10</sup> The effect of the walk away clause is that a Nation can avoid the ban on mining in Antarctica by proposing an amendment to allow the permitting of mining and that does not interfere with existing Antarctic sovereign rights. If the amendment is adopted, mining may occur. If the amendment is not adopted within three years, the Nation may avoid the ban on mining simply by giving two years notice of its withdrawal from the Protocol, resulting in a five year delay. A five year delay is no delay at all to a mining project which has a lead time of more than five years because of the high amount of capital investment involved.

### *Enforcement of the Protocol*

The Protocol requires each Party to take appropriate measures to

comply with it and to exert appropriate efforts to influence other nations to comply.<sup>11</sup> No definition is provided for the terms "appropriate measures" or "appropriate efforts." Each Party is required to notify other Parties of activities affecting implementation of the Protocol. It also establishes a Committee on Environmental Protection to assist the Parties in enforcement but it is advisory only and has no independent powers of enforcement or inspection, leaving enforcement to individual Parties.

Enforcement of the Protocol is subject to binding arbitration or compulsory International Court of Justice jurisdiction. However, this provision of the Protocol does not apply to disputes involving the environmental impact statements or the disclosure of environmental information. Disputes concerning these matters are subject only to an obligation to resolve disputes by peaceful means.

The information gathering and disclosure requirements of the protocol are its most significant provisions. Omitting these provisions from the compulsory dispute resolution requirements renders them virtually meaningless. Almost any dispute involving the Protocol will involve such information gathering or disclosure. Yet, they will be exempt from the requirement of compulsory arbitration.

Regarding damages, the Protocol requires the Parties to undertake elaborate rules and procedures regarding liability for damages from activities within the Treaty area. Unfortunately, no further guidance is given.



*Lack of Fisheries Protection*

Finally, the Treaty fails to address a growing fisheries concern in the Antarctic. The Commission for the Conservation of Antarctic Marine Living Resources regulates commercial fisheries in the Southern Ocean.

The fisheries which raise concern are the toothfish which are subject to an ongoing legal long-line fishery. Recently, New Zealand, France and the United Kingdom have sent ships and planes to Antarctic fishing grounds in search of pirate vessels committing illegal takes of the species. Other nations have also expressed interest in developing fleets to target toothfish. Parties must make efforts to include fisheries in future Antarctic Treaty conservation measures.

**IV. Conclusion**

Realistically, the Madrid Protocol does not provide comprehensive protection for the Antarctic Ocean. However, it does establish norms of conduct with which Nations are expected to comply and enforce. It also provides a means of gathering and disclosing information about the Antarctic environment.

Like many international conservation agreements, the Protocol is crippled by its deference to claims of national sovereignty and its need for national consensus to take enforcement measures. Unfortunately for the protection of Antarctic resources, the Madrid Protocol is part of the evolution of international environmental law and shares the weaknesses of most treaties: general standards, weak institutional structure, and depen-

dance on sovereign States for enforcement. ✓

**ENDNOTES**

1. Protocol on Environmental Protection to the Antarctic Treaty, April 24, 1991, 30 I.L.M. 1455 [hereinafter Protocol].
2. The Antarctic Treaty, December 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.
3. Protocol at Article 3.
4. Protocol at Article 8.
5. Protocol at Article 7.
6. Protocol at Article 15.
7. Protocol at Article 25.
8. *Id.*
9. *Id.*
10. Protocol at Article 13.
11. Protocol at Article 11. *See generally* Francesco Francioni, *The Madrid Protocol on the Protection of the Antarctic Environment*, 28 TEXAS INTERNATIONAL LAW JOURNAL 47, 61 (1993).

## U.S. Navy Departs Antarctic Program After 42 Years

*Adapted from a Press Release by the National Science Foundation*

On February 20, a ceremony in Christchurch, New Zealand, commemorated the withdrawal of the U.S. Naval Antarctic Support Unit which was stationed in New Zealand. The Navy announced its withdrawal in 1993 after 42 years of service. The Navy will continue to provide limited flight support to the Antarctic Program through 1999.

The U.S. National Science Foundation (NSF) will continue to oversee and support the U.S. Antarctic Program. "NSF's support for scientific research in Antarctica remains as strong as ever," said Neal Lane, NSF director. "We thank the Navy for decades of support, which has helped to advance research important to the future of our planet studies on the ozone hole, the stability of Antarctica's ice sheets and the dynamics of the Southern Ocean."

The 109th Air Wing of the New York Air National Guard, already with ten years of experience flying in the Antarctic and 23 years of flying in the Arctic, will assume the Navy's role of flying the ski-equipped LC-130 Hercules aircraft owned by NSF and the Air Guard. The ski planes are the backbone of the USAP's ability to support research across the breadth of the Antarctic continent, a capacity no other nation possesses.

Many other functions performed by the Navy for the USAP have already been turned over to civilian contractors — particularly to Antarctic Support Associates, based in Denver, Colorado. For more information, see its homepage at [www.asa.org](http://www.asa.org).

# The Red Snapper Fishery: High Stakes in Limited Entry

*Kristen M. Fletcher, J.D.*

This year marks a pivotal year in the red snapper fishery due to three events occurring in the management scheme: first, the Gulf of Mexico Fisheries Management Council voted to maintain the 1997 quota for the 1998 season despite scientific evidence of overfishing; second, the Council reaffirmed its decision to require shrimp trawlers to use bycatch reduction devices to reduce the mortality of juvenile red snapper; and third, it implemented its new limited licensing scheme into the fishery.

## I. Limited Entry Hooks the Red Snapper Fishery

The Gulf of Mexico Fishery Management Council first incorporated limited entry methods into its Reef Fish Fishery Management Plan, which manages the red snapper fishery, in November, 1984. Since then, stock assessments have consistently labeled the fishery "overfished."

With these declines in stocks and overcapitalization of the industry, the Gulf Council and fishers have relied upon "limited entry" regimes to ensure sustainable stocks and try to rebuild the red snapper fishery. Limited entry is a general term used for a fishery management program that restricts a fisher's access to open fisheries or limits the catch one may retain. Limited entry schemes proposed to manage the red snapper fishery have included limited licensing schemes, fishery quotas and season closures, individual transferable quotas, and gear restrictions.

Since 1984, management of red snapper stocks has become one of the largest hurdles for the Council to clear. For instance, the Council established an individual transferrable quota system to limit the number of industry participants but was prevented from implementing the system by Congress.<sup>1</sup> Last November, the National Marine Fisheries Service (NMFS) closed the recreational fishery for the first time in history as a result of the quota being reached,

leaving many to question the effectiveness of closures as management techniques.<sup>2</sup> This year, the stakes in the red snapper fishery remain high.

## II. 1998 Quota

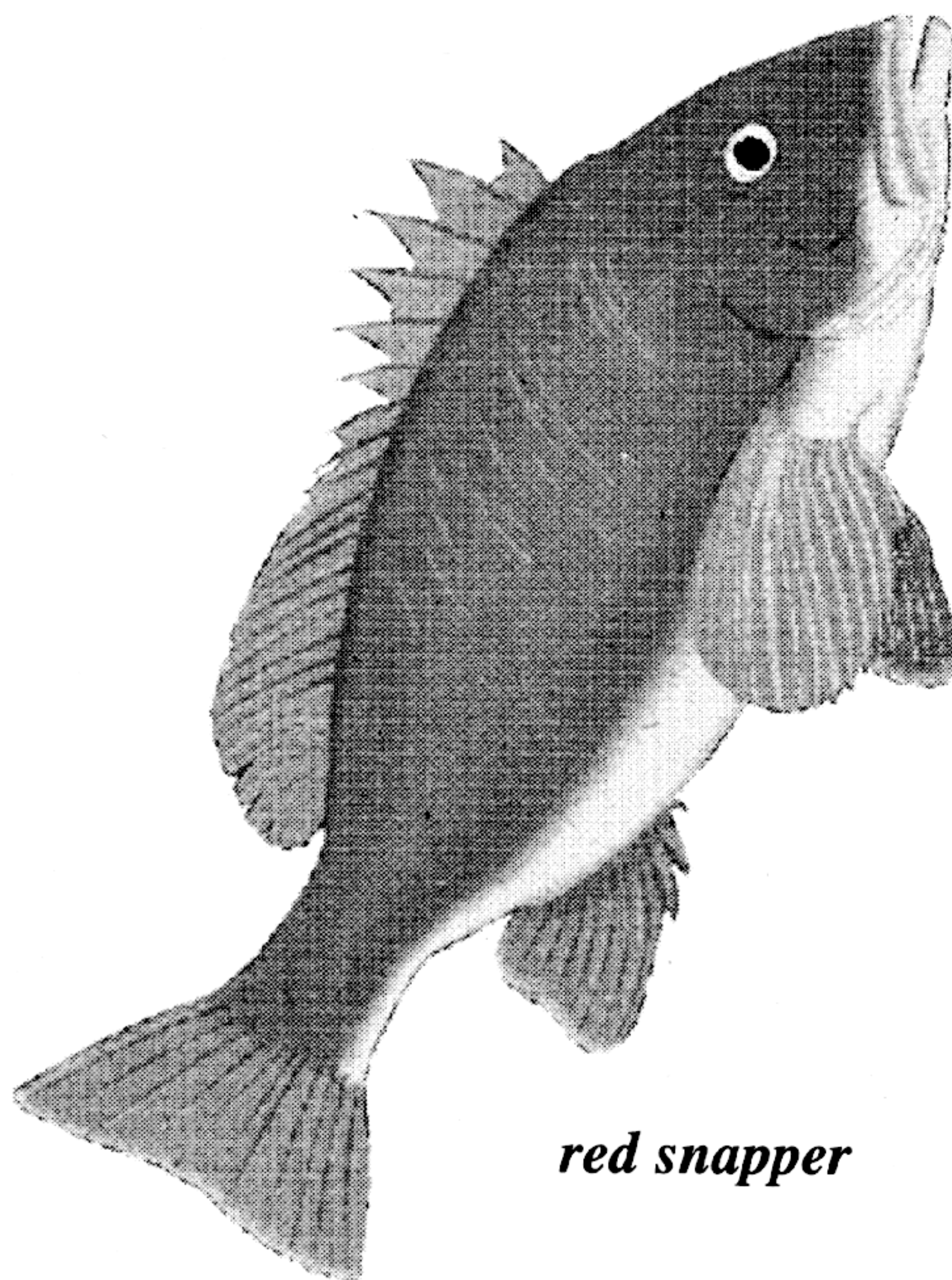
A major challenge rises from the recent Council vote to set the 1998 quota. On January 22, the Gulf of Mexico Fisheries Management Council adopted a 9.12 million pound total allowable catch (TAC) of red snapper for 1998. This vote maintains the TAC at the 1997 level, despite scientific evidence supporting a decrease in total catch.

The vote sets up a possible showdown with NMFS officials, who had recommended that the Council lower the 1998 total allowable catch between three and six million pounds. The Service based its

recommendation on its report that the red snapper stock in the Gulf of Mexico is severely overfished. A consolidated report of three independent peer review panels revealed an overfished fishery as of December, 1997. The Council voted to maintain the status quo even though its own study also disclosed a depleted stock.

Second, it may violate federal fisheries law and the Council's own management plan. Under the Sustainable Fisheries Act of 1996, Congress mandated that the Council enact conservation measures "based on the best scientific information available."<sup>3</sup> National Marine Fisheries Service officials expressed concern that the Council action was not in accordance with this requirement. Also, under the Council's own Reef Fish Fishery Management Plan, the Council must recommend those measures which will allow recovery of the red snapper stock by 2019. The results of the three independent reviews indicate that a status quo TAC may not restore the red snapper stocks by that date.

National Marine Fisheries Service officials will



*red snapper*

review the TAC recommendation of the Council and may either pass it on to the Department of Commerce or override it. In the alternative, the Secretary of Commerce may implement an emergency measure if the Department finds that an emergency situation or overfishing exists. For now, the Council's recommendation of a 9.12 million pound TAC will regulate this year's commercial and recreation red snapper harvest. With the TAC remaining the same, closures in 1998 threaten both the commercial and recreational fisheries as they did in 1997.

### III. Gear Restrictions

Since the implementation of the Reef Fish Plan, the Council has implemented a variety of gear restrictions. Most important for the red snapper fishery is the 1997 plan to require shrimp trawlers to use bycatch reduction devices (BRDs). In January, the Council reaffirmed this decision.

A BRD is a device attached to a shrimp trawling net which allows bycatch species (those not intentionally taken) to escape. This is particularly important for the red snapper species because a high number of juvenile red snapper are killed as a result of bycatch each year, significantly draining the fishery and reducing potential recruitment. Shrimpers argue that requiring the use of BRDs is overburdening and overregulating the shrimp industry. They claim that the device will allow shrimp, the target species, to escape along with juvenile red snapper which will push smaller shrimpers out of the fishery.

The Council's vote to maintain the TAC at 9.12 million pounds suggests that the Council may be relying upon the future reduction of bycatch in order to rebuild the red snapper stock without reducing recreational or commercial quotas. Last year, NMFS approved the Council's recommendation to require shrimp trawlers in the Gulf to use the reduction devices. Even though the requirement was adopted last year, NMFS has not yet implemented it but is scheduled to release a rule this spring. If reduction devices are not implemented this year, the fishery faces another year at a 9.12 million pound quota and a drain on recruitment of juvenile fish due to trawler bycatch.

### IV. Limited Licensing Scheme

The new limited licensing scheme implemented in January closely resembles the temporary endorsement system previously in place. It allows most fishers to fish at the same level as the endorsement system. The Gulf Council created the red snapper endorsement system beginning with the 1993 season. Through extensions, the endorsement system remained in place until January when the Council implemented its permanent two-tier license limitation system.

The system is set up as follows. Class 1 licenses with an initial 2,000 pound trip limit are issued to red snapper endorsement holders as of March 1, 1997. Class 2 licenses with an initial 200 pound trip limit are issued to other holders of reef fish permits as of March 1, 1997, who had any landings of red snapper between January 1, 1990 and March 1, 1997. Vessels that do not have a Class 1 or Class 2 red snapper license are prohibited from commercial harvest of red snapper. The system provides more security to fishers rather than having a temporary endorsement system extended indefinitely.

### IV. The Future of Limited Entry Regimes

Limited entry regimes such as these remain controversial because they restrict fishing in many areas where citizens have traditionally had a common right to access for navigation, commerce, and fishing. Nonetheless, they have evolved into the primary component in Gulf fisheries management, as evidenced by the quota vote, bycatch reduction device requirement, and limited licensing scheme. The future of the red snapper fishery will depend upon proper implementation and effective regimes. ✓

### ENDNOTES

1. The 1996 Amendments to the Magnuson-Stevens Fishery Conservation and Management Act placed a moratorium on the implementation or funding of ITQ programs, specifically the system developed by the Gulf Council. See 16 U.S.C. § 1883 (1998).
2. For a discussion of the first-ever closure of the recreational red snapper fishery, see Richard K. Wallace, *Recreational Red Snapper Fishery Closed*, 17:4 WATER LOG 2 (1997).
3. 16 U.S.C. § 1851(a) (1) (1997).



# OIL CRISIS IN OUR OCEANS

**CORAL: ROADKILL ON THE PETROHIGHWAY**

by **Barbara E. Ornitz, J.D.**

Tageh Press, Glenwood Springs, CO

Price: \$30 340 pp.

Ashley Amos, 2L

Barbara E. Ornitz's *OIL CRISIS IN OUR OCEANS, CORAL: ROADKILL ON THE PETROHIGHWAY* is an excellent account of the devastating effects of the 1994 *Berman* oil spill off the coast of Puerto Rico. The book is a wake-up call that our oceans and ancient coral reefs are in danger. Ornitz candidly notes that some of the greatest dangers facing ocean habitats result from our quest for oil. Ornitz, a marine naturalist and attorney, witnessed the effects of the spill on the island which she calls home, Puerto Rico. Ornitz divides the book into three distinct sections: first, relaying the story of the *Berman* spill; second, explaining the importance of coral to the oceans; and, third, using the *Berman* spill to illustrate prevention methods.

## A. The *Berman* Crisis

Ornitz begins the story of the spill by explaining that "[t]he *Berman* spill was a clear case of 'whatever can go wrong, will go wrong.'" According to Ornitz, the *Berman* spill displays the "serious flaws in the way the oil shipping industry conducts its business." The flaws began when the owners of the *Berman* barge were banned from transporting their vessels in New York as a result of involvement in petroleum explosions, oil spills and the deliberate dumping of raw sewage into New York waters. Undisturbed by the New York ban, the owners simply moved their operations to Puerto Rico to transport fuel across the Caribbean.

Even after the *Berman* hit the sea, Ornitz notes that there were many missed opportunities to prevent the spill. A new towline was needed, but not installed. The old, deteriorating towline broke the night of the spill but was improperly repaired. When the towline eventually broke again that same night, the tugboat's entire crew slept, including the officer appointed to stand watch. No member of the crew noticed the barge drift away from the tugboat until it had run aground.

Ornitz is quick to spread responsibility, however. She questions the United States Coast Guard (USCG) decision to certify the *Berman* as seaworthy in light of its safety deficiencies and the owners' poor environmental record. She criticizes governmental

*According to Coast Guard Captain Robert Ross, "an oil spill is the closest you'll come to a war without killing someone."*

licensing procedures, as well as legislators and lobbyists who killed legislation requiring tugboat inspections.

Finally, Ornitz examines consumer demands which make shipping oil a profitable business. Ornitz opines that unless consumers demand greater regulation of the oil shipping business, "oil will travel unsafely."

The clean up effort evidences the effects of unsafe oil travel. "An oil spill is the closest you'll come to a war without killing someone," stated Coast Guard Captain Robert Ross. Ornitz herself uses military jargon when explaining the clean up. "Battle grounds" are the water's surface, beaches, and seagrass beds, while marine plants and animals become "victims" of the battle. Captain Ross, the officer in charge after the spill, detailed the strategy of the clean up. The Coast Guard assessed the damage to the barge, attempted to prevent more oil from leaking, and removed the barge itself from the reef. The final step was to restore the water, beaches and natural habitats.

To remove the oil from the barge, the Coast Guard and Navy worked together to siphon oil into another vessel, challenged by bad weather, rough seas and the location of the barge itself. The barge was too close to shore to use more effective equipment, but too far away to be directly accessible by boat. Ornitz explains that the "barge had lodged itself in the worst position possible."

Because the barge was too damaged to be repaired in its place or transported to another port without dangerous ramifications, the Coast Guard decided to move the *Berman* to deeper waters and sink it. Ornitz

*cont.*

notes that the unfortunate result of this decision was a second spill of 200,000 gallons of fuel, because the oil remaining in the barge failed to gel when sunk. The Coast Guard had to launch a second clean up effort.

According to Ornitz, even after the extensive efforts, the effects of the oil spill are far from gone, especially for Puerto Rico's marine habitats. In fact, Ornitz shares a shocking statistic: in the first few weeks after the *Berman* spill, 5,268 affected organisms died out of 5,687 originally rescued. Unfortunately, even these numbers are not complete. The *Berman* spill threatened numerous birds who dove into oiled waters or consumed oiled prey. As Ornitz notes, "[n]ot all affected animals washed up onto shores and beaches."

### B. Coral - the "Rainforests of the Ocean"

In the second section of *OIL CRISIS IN OUR OCEANS*, Ornitz introduces the fascinating world of coral. According to Ornitz, coral reefs are known as "rainforests of the ocean" because of the large amount of different organisms which inhabit them. Ornitz explains that coral reefs have existed for millions of years, enduring many natural threats, including hurricane damage, fatal diseases, predators, and global warming. The human threats include pesticides, soil erosion, waste discharge, overfishing, recreational use, and oil pollution.

Oil pollution's effect on coral is an ever increasing threat to coral reefs. Because of consumers' insatiable demands, an increasing number of tankers ship oil around the globe, creating what Ornitz calls a "petrohighway to rival our interstate highways." Unfortunately, while the number of vessels increases, their maintenance decreases. Ornitz states that, "[m]inimum maintenance of aging vessels seems to be the rule, not the exception" which can result in oil spills.

According to Ornitz, "coral can defend itself against spilled oil - to a limited extent." When oil reaches the coral, it retracts and secretes a mucus layer for protection. The coral can later shed the mucus layer and the oil. However, when the quantity of oil is too great, the coral can smother to death. Scientists do not agree on how long it may take coral reefs to recover, if at all, from an oil spill.

### C. *Berman* as a Catalyst

In the book's final section, Ornitz discusses the *Berman* spill as a catalyst: "a person or thing that precipitates change." According to Ornitz, the *Berman* spill resulted in a "shake down to break in the new procedures required by [the Oil Pollution Act of 1990]." The Oil Pollution Act of 1990 (OPA 90) authorizes the Environmental Protection Agency and the United States Coast Guard to oversee responses to oil spills, with the responsible party leading the clean up.

The parties responsible for *Berman* failed to assume this leadership role. Ornitz explains that "[t]he companies and players involved caused the accident by their negligence, and then bowed out of the picture after the \$10 million insurance ran out and the USCG took over." In theory, the party responsible for a spill in U.S. waters is responsible for clean up costs, no matter how high.

The international community takes a different approach to who should pay for spills. Two conventions limit a party's payment of damages under an insurance scheme.<sup>1</sup> The United States is not a party to the international conventions. Instead, Congress requires every ship in U.S. waters to possess a minimum amount of insurance and does not limit the amount which a polluter may be required to pay.

### D. A Book of Solutions

*OIL CRISIS IN OUR OCEANS* effectively details the \$87 million clean up of the *Berman* oil spill, its effects, and the resulting payment debates it caused, and provides a unique look at the underwater world of coral. Ornitz offers the work as a source of solutions, from decreasing oil consumption to legislating policy changes.

"Coral reefs do not enjoy an easy life," says Ornitz. Ten percent are beyond recovery, and about thirty percent face "ecological collapse" within twenty years. Coral reefs are at risk, but as Ornitz states, "there is cause for hope." ✓

#### ENDNOTE

1. See the International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, *reprinted in* 9 I.L.M. 45 (1970); and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution, *reprinted in* 11 I.L.M. 284 (1972).

# Presidential Proclamation

*President William J. Clinton*

**Proclamation No. 7065, 63 Fed. Reg. 4553 (1998).**

*The United Nations has designated 1998 as the International Year of the Ocean to recognize the importance of the ocean, the marine environment, its resources, and the need for sustainable development. It provides an opportunity for governments, organizations, and individuals across the globe to raise awareness and initiate changes needed to sustain marine resources.*

*In January, President Clinton released Proclamation 7065 regarding U.S. participation in the Year of the Ocean. The text of the Proclamation, taken from the Federal Register, follows.*

More than 70 percent of the Earth's surface is covered by water, and more than half the world's population lives within 50 miles of a coastline. We rely on the ocean as both a source and sustenance of life on our planet. It contains a wondrous abundance and diversity of life, from the smallest microorganism to the mammoth blue whale. It is a key source of food, medicine, energy, commerce, and recreation for the peoples of the world, and the more we learn about its influence on climate and weather, the more we realize its impact on our safety and quality of life.

We are only beginning to understand the depths of the ocean's mysteries, but we are quickly learning one crucial lesson: the ocean's resources are limited, and we must work together to preserve them. Many areas are already overfished; decades of pollution, including industrial waste, sewage, and toxic runoff, has taken its toll on the health of the ocean and its living creatures. Many species of fish are threatened with extinction, and even our precious coral reefs, once a safe haven for an amazing variety of animal and plant life, have suffered greatly.

Because the ocean is a treasure that all nations of the world share in common, we must work in partnership to become wise stewards of its many riches. We must strive together--at local, national, and international levels--to preserve the ocean's health, to protect the marine environment, and to ensure the sustainable management of the myriad resources the ocean contains.

Dedicating 1998 as the Year of the Ocean is an important first step in this worldwide endeavor. Throughout the year, individuals, organizations, and governments will participate in activities designed to raise public awareness of the vital role the ocean plays in human life and of the equally vital role that human beings must play in the life of the ocean. The Year of the Ocean provides us with an extraordinary opportunity to learn more about the ocean's unique environment and to collaborate on protecting and preserving its invaluable resources.

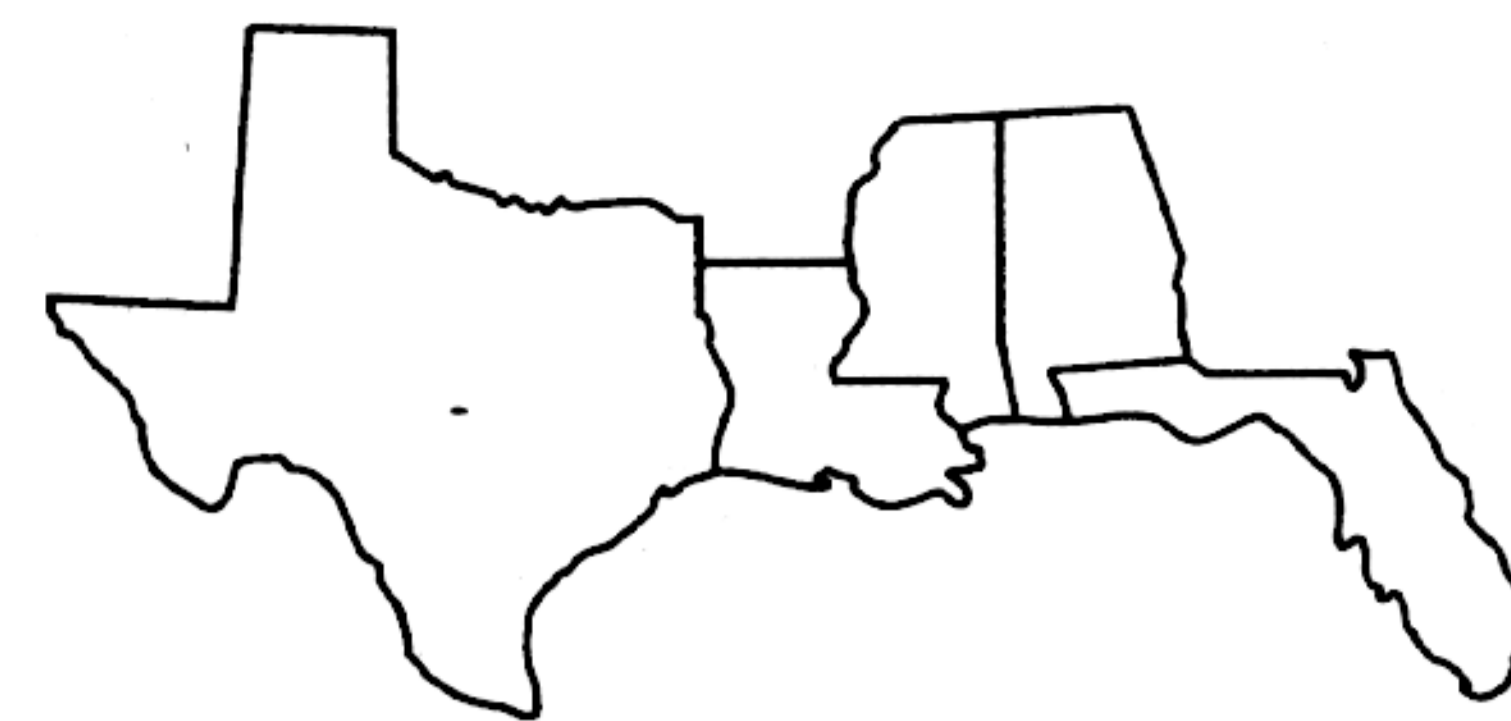
NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, do hereby proclaim 1998 as the Year of the Ocean. I encourage the Governors of the States and the Commonwealth of Puerto Rico and officials of other areas subject to the jurisdiction of the United States to participate in the observance of this year. I invite all Americans to take this opportunity to learn more about the ocean and its vast biodiversity and to become involved in keeping our coastal waters safe and clean.

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



*To find out more, visit the Year of the Ocean homepage at  
[www.nos.noaa.gov/events/oceanyear.html](http://www.nos.noaa.gov/events/oceanyear.html).*

# Lagniappe *(a little something extra)*



## *Around the Gulf . . .*

BHP Petroleum (Americas) Inc. plans to contract with Global Marine Inc. for a deepwater drillship capable of operating in water depths of up to 10,000 feet. The drillship will be used to drill deepwater exploration wells in the Gulf of Mexico.

This winter, chefs along the Atlantic and Gulf coasts announced a "Give Swordfish a Break" campaign — a voluntary moratorium on preparing and serving swordfish until a fishery recovery plan is developed as an expression of concern for overfishing of this species by longline vessels.

For the first time since casinos were introduced to the Mississippi gulf coast, the U.S. Army Corps of Engineers suspended a casino permit to study the environmental impact of a casino and accompanying development. Environmentalists have sued to block two casinos on Bay St. Louis, claiming that development will ruin important wilderness areas and pollute the bay.

In February, the flagship of French explorer La Salle was discovered in the Gulf of Mexico near the Texas coast. The ship, *l'Aimable*, was carrying supplies to start a new colony when it ran aground in February, 1685. Discovered partially exposed under 20 feet of water, its artifacts will go to the state of Texas for conservation.

In January, National Marine Fisheries Service officials filed charges against four dolphin freedom activists for harassing and illegally transporting two captive dolphins and releasing them into waters off Key West in 1996.



## *Around the Nation and the World . . .*



In December, the seafood industry became the first segment of the U.S. food industry subject to mandatory Hazard Analysis Critical Control Point (HACCP) regulations. The seven steps of HACCP aim to ensure seafood safety from the harvest of seafood, through processing, to consumption by the consumer.

A school of herring recently decided to fight back off Norway's northern coast. A trawler made a huge catch of herring, but when the crew tried to haul in the net, the entire school of herring swam for the bottom and capsized the 63-foot boat, sinking the boat in 10 minutes. No one was hurt; it was not clear whether the fish escaped the net.

Australian officials announced a ban against Japanese vessels fishing for Southern bluefish tuna in Australian waters after Australia, Japan, and New Zealand failed to reach consensus on 1998 harvest quotas.

In February, the International Whaling Commission held an intersessional meeting in Antigua to discuss an Irish delegation proposal to allow a limited resumption of commercial whaling in coastal areas.

The National Marine Fisheries Service plans to designate critical habitat areas in waters off Puerto Rico to protect the threatened green sea turtle and the endangered hawksbill sea turtle. The waters surrounding the Islands are one of the few remaining locations where hawksbill turtles occur in considerable densities.

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 NA56RG0129, 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. Graphic on page 14, copyright, NOAA.



The University complies with all applicable laws regarding affirmative action and equal opportunity in all its activities and programs and does not discriminate against anyone protected by law because of age, creed, color, national origin, race, religion, sex, handicap, veteran or other status.

MASGP-98-003-01

*This publication is printed on recycled paper.*

For information about the Legal Program, ocean and coastal law research, and back issues of WATER LOG, visit our homepage at

**Internet**  
<http://www.olemiss.edu/pubs/waterlog/>  
or E-Mail us at [waterlog@olemiss.edu](mailto:waterlog@olemiss.edu)



# WATER LOG

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



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