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WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Monterey Must Pay for Restricting Coastal Development

Claim filed as Civil Rights violation warrants jury determination of "fact-bound" issues

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S.Ct. 1624 (1999).

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

On May 24, the United States Supreme Court ruled that, under certain circumstances, a jury may determine that a governmental rejection of a land use application may constitute a 'taking' of private property.[1] The decision marks the first time the Supreme Court has endorsed the propriety of having a jury determine such an issue. In a case hinging on the Fifth Amendment's 'takings clause,' and the Seventh Amendment's right to a jury trial, the Court ruled that a takings claim filed in the form of a civil rights violation could warrant the use of a jury in determining the "fact-bound" elements of the case.

Background

In 1981, Del Monte Dunes, Ltd., applied for a permit to construct 344 residential units on a 37.6 acre parcel of ocean-front property it owned in Monterey, California. The property was residentially zoned for up to 29 housing units per acre. The permit application, as a result, requested authorization to develop the property at approximately one-third of its zoned capacity. The city rejected the application, noting that a development proposal for fewer units would be looked upon favorably. Each time Del Monte reduced its development proposal, the city denied it, citing land use concerns

see Monterey, pg. 4

The Nature Conservancy Prevails in Coastal Property Dispute

Tabor v. Certain Lands, 1999 WL 236513 (Ala. Civ. App. 1999).

Tim Peeples, 3L

The Alabama Court of Civil Appeals recently determined that The Nature Conservancy (TNC) is the legal owner of coastal grasslands in Alabama once it pays overdue property taxes. The land at issue, known as Rabbit Island in Orange Beach, Alabama, was the subject of a tax sale to Bruce Tabor prior to the date TNC received title. The trial court and the appeals court determined that because the organization maintained "continuous possession" of the land, TNC had the right to the property notwithstanding Tabor's title acquired via a tax sale.

Lakeside, Ltd., initially acquired Rabbit Island in 1988, along with other portions of nearby Ono Island, which it developed. Lakeside, however, failed to pay the property taxes in 1989, and in June 1990, the State of Alabama purchased Rabbit Island and subsequently sold the property to Tabor by a tax deed in January 1994. Unaware of the tax deed, TNC acquired the property

see The Nature Conservancy, pg. 7

In This Issue . . .

Coast Guard Rule Seeks Ballast Water Management

Interim Rule Implements National Invasive Species Act of 1996

33 C.F.R. § 151, 64 Federal Register 26672 (May 18, 1999).

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

On July 1, the U.S. Coast Guard will begin implementing measures to prevent environmental and health problems resulting from harmful aquatic plants and animals carried from abroad in ships' ballast water. The interim rule, published May 18, offers voluntary ballast water management guidelines for ships operating outside U.S. waters and requires each ship to implement a management plan and to submit mandatory reports outlining these management practices. The rule applies to vessels entering U.S. waters after operating beyond the exclusive economic zone and for vessels specifically operating in the Great Lakes or the Hudson River.

Ballast water is any water and suspended matter taken on board a vessel to control or maintain stability. The dumping of ballast water is to blame for the introduction of the zebra mussel which reached the Great Lakes by hitchhiking in the ballast water of a ship originating in either the Caspian Sea or the Black Sea, the animal's natural habitat. Problems caused by non-native plants and animals have increased nationwide with ballast-water dumps frequently identified as a prime culprit.

Congress fought invasions like these when it called for protection of U.S. waters under the Non-Indigenous Aquatic Nuisance Prevention and Control Act of 1990 and updated and reauthorized it in 1996 with the National Invasive Species Act (NISA). The NISA called for increased reporting and the establishment of a National Ballast Information Clearinghouse. The interim rule requires ship operators to supply pertinent information such as the amount of ballast water on board, the originating port and method of managing the water. It also provides voluntary guidelines to minimize the uptake and release of harmful aquatic organisms and sediment.

Each vessel carrying ballast water into U.S. waters after operating outside the Exclusive Economic Zone (EEZ) must either (1) exchange ballast water beyond the EEZ in waters >2000 meters before entering U.S. waters; (2) retain ballast water on board; (3) use an alternative pre-approved method; or (4) discharge ballast water into an approved reception facility.

The interim rule has guidelines similar to those adopted by the International Maritime Organization for worldwide use. The rule will be subject to public comment for 60 days and after implementation, the Coast Guard will monitor compliance by taking samples of ballast water, examining documents, and making other inquiries.

The interim rule is available through the Legal Program's web page under Coastal Links.

Mandatory Record Keeping Requirements

Vessel Information (vessel type, name, official number, owner/operator, gross tonnage, port of registry);

Voyage Information (date and port of arrival, vessel agent, last/next port and country of call);

Ballast Water Information (capacity, volume, tanks);

Ballast Water Management (amount to be discharged, alternative management method if used);

Information on Ballast Water (origin of ballast, dates/locations of exchanges & discharge); and

Certification of Accurate Information.

Sea Grant

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

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

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

Publication Design: **Waurene Roberson**

Policy Assistant: **Brad Rath, 3L**

Research Associates:
Tammy L. Shaw, 3L
Stacy Prewitt, 2L **Tim Peeples, 3L**

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Beachgoers Beware! Property Owners Shielded from Liability on Access Lands

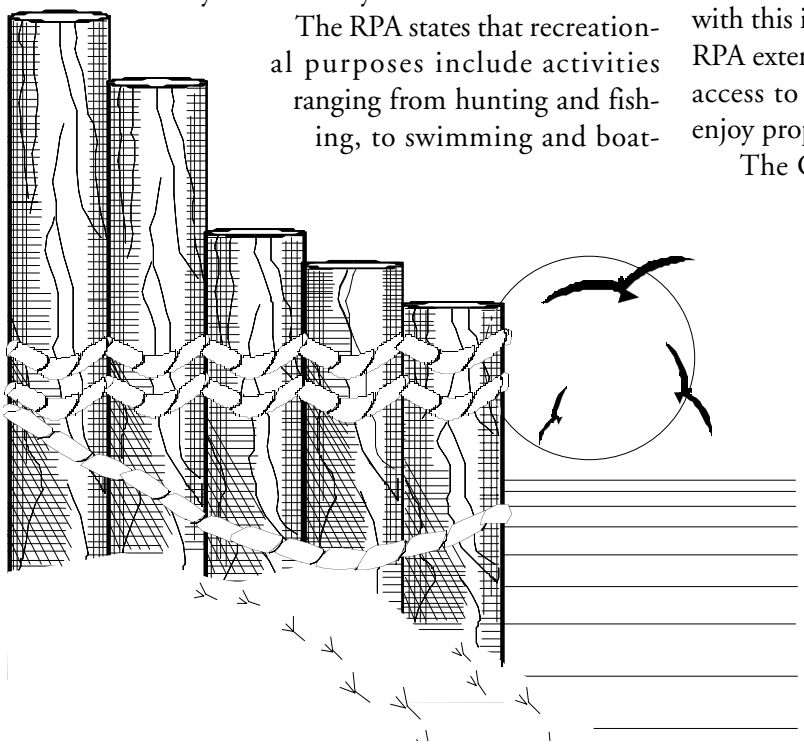
City of Tybee Island v. Godinho, 511 S.E.2d 517 (Ga. 1999).

Stacy Prewitt, 2L
Kristen M. Fletcher, J.D., LL.M.

In February, the Georgia Supreme Court ruled that the City of Tybee Island, a municipality that maintained a sidewalk for public access to the beach, was protected from liability under the state's Recreational Property Act (RPA). The RPA shields property owners from tort liability for injuries occurring on their property which they allow the public to use for recreational purposes without charge. The Georgia ruling highlights the RPA's goals of protecting landowners while encouraging use of public areas. Beachgoers in Mississippi and Alabama should be aware that these states have similar statutes.

Not Just Another Day at the Beach

This case arose from Jairza Godinho's visit to beach at Tybee Island where she fell and broke her wrist as a result of broken pavement on a city sidewalk. The sidewalk ran between a public parking lot and the beach. When Godinho sued, the City contended that because she was using the sidewalk for a recreational purpose, the RPA insulated the City from liability.



The RPA states that recreational purposes include activities ranging from hunting and fishing, to swimming and boating, to pleasure driving and "viewing or enjoying historical, archeological, scenic, or scientific sites."[1] The trial court agreed that Godinho was using the sidewalk for a recreational purpose and that the city was shielded from liability but the Georgia Court of Appeals reversed, finding that the RPA did not apply in this case. First, it held that the RPA could not shield the City from liability because the State, rather than the City, owned the adjacent beach. Thus, the City was not the landowner meant to be protected by the statute. Second, the court concluded that the City had an underlying commercial purpose in providing the sidewalk and, thus, could not claim RPA protection. It found that "the City attracts the public to the beaches, not for the sheer recreational pleasure of the people, but because the public spends money in the City's businesses."[2] The City appealed.

On appeal, the Supreme Court of Georgia first addressed the holding that the RPA was inapplicable because the State owned the adjacent beach. This rationale defeated the very purpose of the RPA because frequently, the recreational activities under the RPA involved a person using one person's land to enjoy property owned by a second person. The court dispensed with this issue concluding that "the plain language of the RPA extends protection to property owners who provide access to their property so that people may access or enjoy property that is actually owned by someone else."[3]

The Court also rejected the notion that the City's financial gain should remove RPA protection. Recognizing that "there is some evidence in the record from which it can be inferred that the City might receive an indirect financial benefit from the sidewalk," the primary purpose was to give the public a place of recreation rather than to make a profit from the use of the sidewalk.[4] Finally, the Supreme Court found that applying the RPA to a municipal sidewalk does not conflict with a Georgia law holding a city liable for certain defects in its streets and sidewalks. Rather, the court held that when the sidewalk is used for a "recreational purpose," the RPA governs.

Unfortunately, the court did not specify when an activity on a sidewalk may be non-recreational given the broad definitions in the RPA.

RPAs & the Gulf Coast

Like Georgia, Mississippi and Alabama have recreational use statutes providing that landowners owe recreational visitors only a duty of care to keep property safe and a duty to give a warning of a dangerous condition as long as the landowner receives no payment.[5] Both Mississippi and Alabama require that landowners give public notice that the land is available for use and generally provide protection as long as the landowner does not act willfully or maliciously.[6] Therefore, like beachgoers at Tybee Island, Georgia, visitors to beaches in Mississippi and Alabama should also beware that while they may have access to public beaches, a recreational property act may shield landowners from liability on these lands.

ENDNOTES

1. GA. CODE ANN. § 51-3-20 (1999).
2. *Godinho v. City of Tybee Island*, 499 S.E.2d 389, 391 (Ga.Ct.App. 1998).
3. *City of Tybee Island v. Godinho*, 511 S.E.2d 517, 518 (Ga. 1999).
4. *Id.* at 519.
5. ALA. CODE §§ 35-15-1 to -28 (1998) and MISS. CODE ANN. §§ 89-2-1 to -7 and 89-2-21 to -27 (1998).
6. ALA. CODE § 35-15-28 (1998) and MISS. CODE ANN. § 89-2-7 (1998).

Monterey, from pg. 1

and indicating that a less ambitious proposal might merit approval.

After numerous revisions and denials, Del Monte's final application proposed 190 residential units and dedicated more than half of the property to open space, public beach access, and conservation of declining buckwheat habitat in the area. The final plan was assessed favorably by the city's architectural review committee and the planning commission's professional staff. The commission nonetheless rejected the staff recommendation and denied the development plan. The city council upheld the commission's application denial noting general findings regarding inadequacy of access and concerns about harm to the environment. Del Monte determined that development of the area would not be permitted by the city under any circumstances and filed suit against the city for a regulatory taking under the Fifth Amendment and a denial of its Due Process and Equal Protection rights secured by the Civil Rights Act of 1964 (42 U.S.C. § 1983).

Trial by Jury

Del Monte contended that by continually rejecting its permit applications and by refusing to pay compensation for its economic losses, the city's actions amounted to constitutional due process and equal protection violations under § 1983 and, as such, warranted a jury determination. The trial court read § 1983 in conjunction with the U.S. Constitution's Seventh Amendment jury trial provision and ruled that Del Monte had a right to a jury trial regarding factual determinations in the case. The district court instructed the jury on the standard of determining whether a 'regulatory taking' had occurred noting that the jury should find in favor of Del Monte Dunes, if it were found "either that Del Monte Dunes had been denied all economically viable use of its property or that 'the city's decision to reject the plaintiff's 190 unit development proposal did not substantially advance a legitimate public purpose.'"[2] The jury found in favor of Del Monte on the takings claim as well as the Equal Protection and Due Process claims.

The City's Appeal

The city appealed the decision to the Ninth Circuit Court of Appeals. In affirming the district court's decision, the Ninth Circuit supported its reasoning by citing the Supreme Court's use of a "rough proportionality" test from a 1994 'takings' case. In *Dolan v. Tigard,* the Supreme Court ruled that in determining the extent to which a government authority might require exactions – dedications of private land for public use – in exchange for allowing a particular type of development, the government must show that the exactions sought are roughly proportional to furthering a legitimate public purpose.[3]

In affirming the trial court's decision, the Ninth Circuit held that the district court had properly allowed a jury determination, and that regarding the 'takings' test, "[e]ven if the City [of Monterey] had a legitimate interest in denying Del Monte's development application, its action must be "roughly proportional" to furthering that interest."[4] The City of Monterey appealed the decision to the United States Supreme Court.

High Court Rules

In reviewing the Del Monte case, the Supreme Court addressed the city's argument that a jury determination was improper because the claim for compensation was based on a regulatory taking rather than a denial of civil rights and that takings claims are ordinarily determined by a judge. A majority of the Court reasoned that while § 1983 does not automatically confer a right to a jury trial, and takings claims

historically did not warrant a jury trial, the Del Monte question "was essentially fact-bound in nature" and therefore properly submitted to the jury.[5]

Application of 'Rough Proportionality' test

While the Supreme Court affirmed the Ninth Circuit's jury determination ruling with a 6-3 majority, the justices were unanimous in addressing the Ninth Circuit's improper reliance on the "rough proportionality" standard espoused in *Dolan*. While the Ninth Circuit noted that it would be appropriate to apply the "rough proportionality" test, the Supreme Court ruled that the application of that standard was not pertinent in the Del Monte case because the city did not require exactions in exchange for the permit issuance. "We have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land use decisions conditioning approval of development on the dedication of property to public use," ruled the Court.[6]

"We have not extended the rough-proportionality test of Dolan beyond the special context of exactions."

Conclusion

In its most recent takings case, the Supreme Court has put lower courts on notice that the door widened in takings analysis by the rough proportionality test espoused in *Dolan* was not opened for all takings cases as a general rule. The Court's explicit and unanimous ruling on that aspect of the case highlights the boundaries within which regulatory takings cases will be adjudicated in the future.

ENDNOTES

1. A brief history of Fifth Amendment 'takings' law as it has developed regarding coastal property appears on this page, see ***Taking Note***.
2. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624, 1634 (1999) (quoting trial court's jury instructions).
3. *Dolan v. Tigard*, 512 U.S. 374 (1994).
4. *Del Monte Dunes at Monterey, Ltd., v. City of Monterey*, 95 F.3d 1422, 1430 (quoting *Dolan v. City of Tigard*, 512 U.S. at 391).
5. *City of Monterey*, 119 S.Ct. at 1644 (citing Ninth Circuit's reasoning on the matter, 95 F.3d at 1340).
6. *Id.* at 1635.

Taking Note . . .

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

In part, the Fifth Amendment of the United States Constitution states "nor shall private property be taken for public use without just compensation." This provision has come to be known as the "takings clause." Over the course of the nation's history, the clause has been used by private property owners to demand compensation when a government authority "takes" private property away by either physically occupying it or by imposing such an onerous regulatory burden as to deny the owner of all economically viable use of the property.

Coastal Property Serves as Fertile Ground for Takings Claims

With the ever increasing shift in population to the coast for residential, business, and recreational purposes, and the desire of states and municipalities to protect coastal areas and their inhabitants from environmentally detrimental development, conflicts between property owners and regulatory authorities have risen steadily. Over the course of the last dozen years, the Supreme Court's 'takings' jurisprudence has evolved, for the most part, in a series of cases involving beachfront or coastal property.

In ***Nollan v. California Coastal Commission*** (1987), the Supreme Court reviewed a California case where the oceanfront property-owning Nollan family was being called upon to dedicate a lateral public easement across their property in exchange for a permit to build a larger beachhouse. The Court likened the sought-after exchange to an extortionate tactic and ruled that such an easement would constitute a 'taking' of private property, since the state's willingness to allow a larger beach-house obviated any claim that the denial of a permit was related to any legitimate state interest.

In ***Lucas v. South Carolina Coastal Commission*** (1992), the Supreme Court ruled that all private property is encumbered with some "background" governmental interests that allow a federal, state, and/or municipal authority to impose certain regulatory restrictions. The Court held that "[w]hen, however, a regulation that declares 'off limits' all economically productive or beneficial use of land goes beyond what the background principles would dictate, compensation must be paid to sustain it."

In the non-coastal takings case of ***Dolan v. City of Tigard*** (1994), the Supreme Court expanded upon its ruling in *Nollan* and ruled that in a circumstance where a governmental authority sought land use exactions in exchange for a land use permit, the governmental authority must show a "rough proportionality" between the exactions sought and the "nature and extent" of the proposed development's impact.

In the latest takings decision, ***Del Monte Dunes*** (1999) (see this issue, page 1), the Supreme Court noted that the "rough- proportionality test" used in ***Dolan*** should not be used in circumstances beyond those addressing exactions cases.

Court Finds Quick-Take Unconstitutional

Lemon v. Mississippi Transportation Commission, 1999 WL 161328 (Miss. 1999).

Kristen M. Fletcher, J.D., LL.M.
Stacy Prewitt, 2L

A Mississippi landowner recently struck a blow to Mississippi's quick-take statute which was deemed unconstitutional by the Mississippi Supreme Court in March. Fred Lemon, owner of two lots on Highway 90 in Ocean Springs that were the subject of a road-widening project of the Mississippi Transportation Commission (MTC), took legal action claiming that the statute that authorized the MTC to take possession violated his constitutional rights.

Generally, a quick-take statute authorizes a government agency to "take" private property for a public purpose if compensation is paid to the owner. The quick-take statute expedites acquisition of the property, making the process easier for the agency taking the land. The purpose of the Mississippi quick-take statute was "to enhance the State's highway program by providing the highway department access to the needed right-of-way as quickly as practicable consistent with the legitimate interests of the landowner."[1] The Mississippi quick-take statute provides that when the MTC "finds it necessary to condemn property,"[2] it files a complaint and declaration of taking in the circuit or county court where the property is located, deposits the fair market value to the court, and serves summons on the landowner. Upon proof of service of process, title and right to immediate possession of the land vests in the MTC.[3] After the title has vested in the MTC, the statute provides the landowner a hearing to determine questions of title to the land, interest taken and area taken.[4]

On August 15, 1997, the MTC used the quick-take statute to take Lemon's properties for a highway project to widen portions of Highway 90. The MTC properly filed Declarations of Taking and served process on Lemon on August 22. Pursuant to the statute, the trial court granted the MTC immediate right and title to the property on August 28. Lemon was denied his appeals motions but the Supreme Court granted interlocutory appeal to determine the statute's constitutionality.

Due Process

Observing that "it is . . . [textbook] law that our state and federal constitutions prohibit laws which permit deprivation of property without prior notice or hearing,"[5] the state Supreme Court determined that even though the quick-take statute does provide for predeprivation notice and a postdeprivation hearing, the ultimate issue is whether the postdeprivation remedy is enough to satisfy due process. Lemon asserted that the statutory notice is inadequate because upon delivery, the MTC is entitled to immediate possession. He argued that a landowner should be entitled to a hearing before the property is taken in order to be heard on questions of public use, validity of the taking and other issues. The MTC countered that such a hearing was not necessary because quick action was necessary and reasonable in this case[6] and because the trial court retains discretion after title vests in the MTC to dismiss and rescind all prior orders if a property owner seriously challenges any issue in the condemnation process.

Noting that the issue of procedural due process and the adequacy of postdeprivation hearings has been a frequent subject in the federal courts, the Mississippi Supreme Court followed U.S. Supreme Court precedent and determined that "regardless of the adequacy of the statute's post-deprivation remedies, the statute must provide a predeprivation hearing before taking property."[7] The Court reasoned that in this case, granting the landowner a hearing before the taking of property was not impossible but merely inconvenient for the MTC. In addition, the deprivation suffered by the landowner was predictable and could be avoided. It concluded that "in situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation . . . remedy to compensate for the taking."[8]

Determination of Public Use

Lemon additionally argued that the statute illegally bypasses the Mississippi Constitution Article 3, Section 17 requirement of a judicial determination of public use. Instead, it authorizes MTC to make the public use determination. The MTC responded that the postdeprivation judicial determination satisfies this requirement. The Court found that Section 17 mandates the determination of public use for the purpose of eminent domain is a judicial question and must be proven by the condemning authority whenever the private property is taken. In this case, Section 17 requires this judi-

cial question to be answered in a *predeprivation* hearing, not a postdeprivation hearing as provided in the quick-take statute.

Separation of Powers

Lastly, Lemon challenged the statute on the grounds that it violated the separation of powers provisions of the Mississippi Constitution. The Court quickly discharged this argument as Lemon failed to raise the issue at trial.

Conclusion

Lemon's action brought to light the fact that Mississippi's quick-take statute failed to rise to the proper level of constitutional protection and ultimately, the action leaves the MTC with more detailed and time-consuming procedures for eminent domain proceedings.

ENDNOTES

1. *Hudspeth v. State Highway Commission*, 534 So.2d 210, 213 (Miss. 1988).
2. MISS. CODE ANN. § 65-1-303(1) (Supp. 1998).
3. *Id.* at § 65-1-305(1) (emphasis added).
4. *Id.* at § 65-1-313.
5. *Lemon v. Mississippi Transportation Commission*, 1999 WL 161328, *6 (Miss. 1999).
6. The MTC claimed a need to alleviate traffic. Before MTC may receive bidding on construction contracts or move utilities, it must have title to the property and the quick-take statute allows for quick acquisition and prevents landowners from delaying projects with court proceedings. *Id.* at *3.
7. *Id.* at *7.
8. *Id.* (quoting *Zinermon v. Burch*, 494 U.S. 113, 132 (1990)).

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in November 1994. Both TNC and Alabama environmental officers inspected Rabbit Island prior to the transfer of title to TNC and found nothing to indicate Tabor's presence on the property. After acquiring title, TNC visited and inspected the property on a regular basis.

In April 1997, Tabor sought a court order declaring him to be the rightful owner of Rabbit Island. The trial court ruled against Tabor, finding that TNC and its predecessor, Lakeside, maintained continuous possession of the land and held a validly transferred title. Tabor appealed.

Legal Possession of the Land

On appeal, Tabor first argued that Alabama Code § 40-10-82 applied giving property owners a three-year window within which to redeem their property when a tax sale is involved.[1] According to Tabor, when TNC failed to pay the back taxes within three years of the January 1994 tax sale, it lost the right to redeem the property. TNC countered that it and Lakeside had maintained constructive possession of Rabbit Island from a period pre-dating the 1994 tax sale, and, therefore, Alabama Code § 40-10-83, which grants the original owner an unlimited time period to redeem property if there has been continuous possession of the land, applies.[2] As proof of continuous possession and notice of its ownership, TNC offered evidence of regular visits and inspections of Rabbit Island.

The Court of Civil Appeals agreed with TNC, finding that, while there was no actual, physical possession in this case, TNC had continuously maintained "constructive possession" of Rabbit Island. To constructively possess land, the court declared, one must merely use the land in a manner consistent with the nature of the property and in a manner which would give a reasonable person notice that another person claimed an interest in the land. The court found that TNC had used Rabbit Island as a reasonable person would have, and that one in Tabor's position should have recognized the presence of this adverse party. Because of that continuous possession, TNC was eligible for the extended period to redeem the property.

Tabor argued, however, that he had severed TNC's title through adverse possession, a legal method of acquiring title to land by possessing it in the open for a specified period of time. Alabama courts have held that an owner's title, as long as constructive possession is maintained following a tax sale, may only be cut off by adverse possession by the tax purchaser.[3] TNC countered that Tabor failed to use the property in a manner that informs the public of his claim to ownership because Tabor only used the land occasionally, did not construct a residence or place any structures on the land, did not post any signs, nor alter any vegetation. Finding for TNC, the court noted Tabor's occasional use of Rabbit Island but found his actions insufficient to establish adverse possession and sever TNC's title.

Finally, Tabor argued that TNC's title was invalid because the deed was not signed by an authorized agent of Lakeside. TNC responded that Allen Cox, an agent of one of Lakeside's general partners, had signed the document. With no evidence that Cox lacked the authority to act on behalf of Lakeside, the Court of Civil Appeals quickly dismissed Tabor's contention.

By ruling in favor of TNC, the Alabama Court of Civil Appeals sends a warning to landowners that possession of property title may not be sufficient, especially regarding valuable coastal property. Rather, constructive or actual possession and knowledge of one's land is necessary.

ENDNOTES

1. ALA. CODE § 40-10-82 (1993).
2. ALA. CODE § 40-10-83 (1993).
3. *Hand v. Stanard*, 392 So. 2d 1157, 1160 (Ala. 1980).

On the Line with NMFS's New Habitat Conservation Director

Interview with Dr. Andrew J. Kemmerer

On May 28, Dr. Andrew J. Kemmerer moved from his long-held position as Southeast Regional Administrator of the National Marine Fisheries Service (NMFS) to lead the Office of Habitat Conservation at NOAA Fisheries headquarters in Silver Spring, Maryland. As Southeast Regional Administrator, Kemmerer was responsible for all NMFS operations in the Southeast Region, including the Gulf of Mexico. We caught up with Dr. Kemmerer before his move to Silver Spring.

WATER LOG: What is the greatest challenge facing fisheries managers today?
Kemmerer: Unquestionably, the greatest challenge comes when trying to rebuild overfished stocks which requires reducing fishing mortality. This affects the users directly and, unfortunately, the initial reaction often is an attack of the science which can discredit a subsequent management program. Recovering stocks also create challenges as the fishers catch more fish, find fish reinhabiting some areas, and more fishers target the fish because of greater availability. It is tough to explain to a fisher why he individually is not allowed to catch more fish when the abundance of the stock exceeds that in the past 10 or 20 years. But, with a recovering stock, more people are catching more fish faster which can add up to a larger harvest than the stock can stand.

WATER LOG: What is the role of the Southeast Regional Administrator as NMFS representative on the Gulf of Mexico Fisheries Management Council and how do you contribute to the Council's decision-making process?
Kemmerer: There are really two roles. The first is as a voting Council member in the same sense as all other voting members. The only difference is that the Administrator represents the agency and the other Council members look to that position to respond to questions and requests. The second role is representing NMFS in reviewing and accepting or rejecting management measures proposed by the Council. In this capacity, the Administrator often serves as an advocate for measures proposed by the Council and in doing so often has to defend the proposals up through the chain-of-command, while ensuring that the requirements of the Magnuson-Stevens Act are met.

WATER LOG: Since the passage of the Sustainable Fisheries Act, the future of fisheries management seems to be focused on Essential Fish Habitat (EFH). How do you see the EFH regulations being implemented and will they be successful in changing the focus of management to protection of habitat?
Kemmerer: I don't believe anyone knows fully what the impact will be from the EFH designations. Unquestionably, they will lead to greater involvement of the Councils in habitat issues. The management authority of the Councils, however, will be primarily limited to effects of fishing and fishing gear on habitats as this is the only area where we have direct regulatory authority. The positions and decisions of the Councils on habitat matters will still have significant impact as the other agencies with regulatory authority will be looking at the Councils and NMFS for comments and recommendations on proposed habitat alterations. We look at this as a very positive step which will lead to healthier fisheries.

WATER LOG: Congress also mandated that the National Marine Fisheries Service and the Councils take actions to rebuild fisheries while considering impacts that such actions will have on fishing communities. What are some of the challenges involved with this kind of balancing?
Kemmerer: Our first obligation is to ensure that management measures are in place to recover overfished stocks and prevent overfishing. Because this usually involves reducing fishing mortalities, there will be impacts on fishing communities, but hopefully short-term. Ultimately, these communities will benefit from rebuilding programs. Minimizing the impacts requires public involvement in the management process, but will also necessitate more funding and effort being devoted to understanding the social and economic structure of the fisheries.

WATER LOG: There seems to be a struggle between fishers and the National Marine Fisheries Service regarding what is reliable science and how stock assessments should be completed. Do you see this struggle being resolved in the near future and how?
Kemmerer: I have confidence in the science being used by the Council in managing fisheries. Maybe this is

because of my background in science and my knowledge of the dedication and talent of the fishery science community in general. This community includes scientists in state fishery agencies, universities, and in private institutions. Unfortunately, all too often the struggles you mention involve relatively unimportant details of a database or a scientific method, and not in how adequate the science is for sound management decisions. I also have confidence in the science because of our insistence, and the insistence of the Council, on ensuring that the science is adequately peer reviewed. We welcome any and all opportunities for good peer reviews. In 1997, the science being used by the Gulf Council for red snapper management went through several peer reviews which concluded that the science was adequate for sound management decisions. There will continue to be differences in how science is done and interpreted, which is healthy. However, the public is wise to place confidence on the peer-reviewed science rather than unsubstantiated claims.

WATER LOG: You have been promoted to lead the Office of Habitat Conservation at NOAA Fisheries headquarters. How has serving as Southeast Regional Administrator prepared you for this new challenge and do you have any parting words?

Kemmerer: This is going to be tough as I have spent most of my professional career in the southeast. I have been a part of some very significant conservation and management success stories, and the people I have dealt with over the years from the deck hand on the shrimp trawler to the captain of a chartered fishing boat have been some of the best I have known. We need these people because of their basic values and knowledge, and because of what they add to our society culturally, economically, and socially.

Habitat is extremely important for fisheries in the southeast region, which may be one of the reasons I was selected for the position in Silver Spring. We tend to be unique here because so many of our most important fishery resources depend on estuarine to oceanic habitats within their life cycles. It will be a challenge, but one I think I will enjoy as long as I get a chance once in a while to return to the southeast which I consider home.

NOAA Moves Kemmerer to Headquarters, Hogarth to Southeast

NOAA Fisheries Director Rolland Schmitten recently announced the reassignment of two senior managers from within the agency in an effort to strengthen habitat conservation activities while providing continued strong leadership in the Southeast.

Effective May 28, Southeast Regional Administrator Dr. Andrew Kemmerer will lead the office of habitat conservation at NOAA Fisheries headquarters in Silver Spring, Maryland. Kemmerer's duties will include dealing with controversial issues, such as implementing new Congressional mandates to rebuild fisheries and protect marine life while considering the effects of fishing practices on essential fish habitat.

"Andy's excellent managerial and negotiating skills will improve our interactions with the fishing industry and environmental organizations as we implement critical habitat measures within the agency's 40 fishery management plans," said Schmitten. "We need his experience and scientific strength in this important post."

Dr. William Hogarth will replace Kemmerer as Southeast regional administrator in St. Petersburg, Fla., moving from his post as Southwest regional administrator in Long Beach, Calif. Southwest Region Deputy Director Rodney R. McInnis will temporarily act as regional administrator until a permanent replacement is found. "Bill has extensive past experience in Southeast fisheries management and has considerable knowledge of the concerns that face the resource and fishermen there," said NOAA Fisheries Deputy Director Andrew Rosenberg. "Shifting Bill to head the Southeast region will ensure that the high quality of management and service will continue as we bring Andy to headquarters."

Before becoming Southeast regional administrator, Kemmerer was director of NOAA Fisheries' Mississippi Laboratory, where he was involved in national and international scientific studies of fishery resources, gear technology, and engineering and remote sensing devices. He also has held academic positions with Mississippi State University, Jackson State University and the University of Puerto Rico. Kemmerer received B.S. and M.S. degrees from the University of Arizona and a Ph.D. in aquatic ecology from Utah State University.

Wetlands Regulation: "Tulloch Rule" Overruled

National Mining Association et al. v. U.S. Army Corps of Engineers , 145 F.3d 1399 (D.C. Cir. 1998).

F. Allen Barnes, J.D.
Robert A. Tufts, J.D.

In 1993, the U.S. Army Corps of Engineers (Corps) promulgated a regulation ruling that incidental fallback that accompanies dredging is subject to the Clean Water Act's (CWA) permitting provision for "discharge" of dredged or fill material. The American Mining Congress and other trade associations challenged the 1993 regulation which was known as the Tulloch Rule.[1] The federal district court hearing the case held that the rule exceeded the Corps' scope of authority and therefore was invalid. The Corps appealed the decision and in 1998, the U.S. Court of Appeals for the District of Columbia affirmed the decision holding that the Tulloch Rule exceeded the Corps' authority to regulate any "addition" of a pollutant to navigable waters under the CWA and enjoined the Corps and EPA from applying the rule.[2]

Background

Section 404 of the CWA authorizes the Corps to issue permits, after notice and public hearing, "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[3] For the purposes of the CWA, "navigable waters" has been construed to include wetlands.[4]

In 1977 the Corps promulgated regulations tracking the language of the CWA and defining "discharge" as "any addition of dredged material into the waters of the United States."[5] A 1986 regulation exempted from the permit requirement any "*de minimis*, incidental soil movement occurring during normal dredging operations."[6] Although this regulation did not define "normal dredging operations," it did give some guidance as to the exemption's coverage: Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. "Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a 'discharge of dredged material,' we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress."[7]

The Tulloch Rule

The Tulloch case involved a development project site in North Carolina. In 1987, Corps personnel determined that about 700 acres of the site were wetlands. However, the developer consulted with the Corps at various stages during the development to ensure the project could be implemented without the need for a Section 404 permit.

The developer drained the area to lower the water table and eliminate wetland hydrology and wetland vegetation. A consultant had determined that, by constructing some ponds and a network of ditches 4 feet deep every 200 feet, the area could be drained. The developer obviated the need for a permit by not discharging dredged material. The soil was removed with sealed buckets on draglines and backhoes. The excavated material was placed in sealed containers on the back of trucks and dumped on upland sites. As a result of these alterations, the water table dropped and the Corps no longer considered the area a wetland. Because the developer's actions involved only minimal incidental releases the Corps determined Section 404's permitting process did not apply.

The North Carolina Wildlife Federation filed a lawsuit against Tulloch to enforce Section 404 requirements.[8] As part of the settlement of this case the Corps and the Environmental Protection Agency (EPA) agreed to propose new rules governing the permit requirements for landclearing and excavation, resulting in what has come to be known as the Tulloch Rule.

Specifically, this rule redefined "discharge of dredged material" to include "any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation."[9] Additionally, EPA promulgated a parallel rule redefining "discharge."[10]

The Tulloch Rule covered all discharges, subject to the limited exception for de minimis discharges that the Corps was convinced (i.e. burden is on the landowner) would not have the effect of "destroying or degrading an area of waters of the United States,"[11] whereas the 1986 rule exempted *de minimis* soil movement. In promulgating this rule the Corps "emphasized that the threshold of adverse effects for the *de minimis* exception is a very low one."[12] Additionally, in the preamble to the Tulloch Rule the Corps stated "it is virtually impossible to conduct mechanized landclearing, ditching, channelization or excavation in waters of the United States without causing incidental redeposition of dredged material (however small or temporary) in the process."[13] The Tulloch Rule altered the preexisting regulatory framework by removing the *de minimis* exception and

by adding coverage of incidental fallback.

National Mining et al.

The National Mining Congress claimed that the Corps had exceeded the scope of the Corps' regulatory authority under the CWA. The trade organizations argued "that fallback, which returns dredged material virtually to the spot from which it came, cannot be said to constitute an addition of anything."[14] The agencies countered with the argument that "wetland soil, sediment, debris or other material in the waters of the United States undergoes a legal metamorphosis during the dredging process, becoming a 'pollutant' for purposes of the Act. If a portion of the material being dredged then falls back into the water, there has been an addition of a pollutant."[15]

The National Wildlife Federation, who intervened as defendants, argued this reasoning demonstrated that regulation of redeposit was actually required by the Act. Additionally, the National Wildlife Federation complained that the Court's understanding of "addition" removes the regulation of dredged material from the statute.[16] Since dredged material comes from waters of the United States, any release or discharge of such material back into the waters could technically be described as a "redeposit." The Fifth Circuit addressed this problem in 1983 when it stated, "dredged material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute."[17] Although the fifth circuit court held that "addition" may include "redeposit" it did not consider incidental fallback at all.

The Federal Appellate Court ruled the Tulloch Rule exceeded the Corps' authority under the Clean Water Act to regulate any "addition" of pollutant to navigable waters. The Court stated:

> the straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge.[18]

Additionally, stating the Tulloch Rule's "overriding purpose appears to be to expand the Corps' permitting authority to encompass incidental fallback and, as a result, a wide range of activities that cannot remotely be said to "add" anything to the waters of the United States," the Court held that by asserting jurisdiction over "any redeposit," including incidental fallback the Tulloch Rule "outruns the Corps' statutory authority."[19]

Conclusion

In reaching its decision, the Court of Appeals specifically noted the narrowness of its holding. "We do not hold that the Corps may not legally regulate some forms of redeposit under its [Section] 404 permitting authority. We hold only that by asserting jurisdiction over 'any redeposit,' including incidental fallback, the Tulloch Rule outruns the Corps' statutory authority. Since the Act sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other, a reasoned attempt by the agencies to draw such a line would merit considerable deference."[20]

F. Allen Barnes is an attorney and assistant professor, Department of Forestry, Mississippi State University, and Robert A. Tufts is an attorney and associate professor, School of Forestry, Auburn University.

ENDNOTES:

1. *American Mining Congress v. U.S. Army Corps*, 951 F. Supp. 267 (D.D.C. 1997).
2. *National Mining Association v. U.S. Corps of Engineers,* 145 F.3d 1399 (D.C. Cir. 1998).
3. 33 U.S.C. § 1344 (1999).
4. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).
5. 42 Fed. Reg. 37,145 (1977).
6. 51 Fed. Reg. 41,232 (1986).
7. *Id.* at 41,210.
8. *North Carolina Wildlife Federation v. Tulloch* C/V-No. C-90-713-C/V-5-BO (E.D.N.C. 1992).
9. 33 CFR § 323.2(d)(1)(iii) (1998).
10. 40 CFR § 232.2(1)(iii) (1998).
11. 33 CFR § 323.2(d)(3)(I) (1998).
12. 56 Fed. Reg. 45,020 (1991).
13. 56 Fed. Reg. 45,017 (1991).
14. *National Mining* at 1403.
15. *Id.* 1403.
16. *Avoyelles Sportmen's League v. Marsh*, 715 F.2d 897, 924 (5th Cir. 1983).
17. *National Mining* at 1406.
18. *Id.* at 1404.
19. *Id.* at 1405.
20. *Id.*

Agencies Alter Incidental Fallback Rule

On May 10, the EPA and Corps revised the definition of dredged material in response to this court decision. Prior to May 10, "disposal of dredged material" included "*any redeposit . . .* including excavated material, into waters of the United States, which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation." The rule now replaces "any redeposit" with "*redeposit of dredged material other than incidental fallback*." *64 Fed. Reg. 25120, 33 C.F.R. § 232, 40 C.F.R. § 232 (1999).*

Access the Coastal Links page of the Legal Program Website for the text of the rule.

1999 Mississippi Legislative Update

John Duff, J.D., LL.M., Timothy Peeples, 3L, and Brad Rath, 3L

The following is a summary of coastal, fisheries, marine, and water resources related legislation enacted by the Mississippi legislature during the 1999 session.

Senate Resolution 4. *Adopted March 30, 1999.*
Amends Senate Resolution No. 38, 1998 Regular Session, to expand the membership of the Coastal Streams Water Basin District Study Committee to include the Senators who represent Stone, Pearl River, and George Counties.

Senate Resolution 57. *Adopted March 30, 1999.*
Creates a special study committee, consisting of nine Senators, to report on the effect of the federal National Pollutant Discharge Elimination System (NPDES) storm water management requirements on state and local governments. The report is due before February 1, 2000.

1999 Mississippi Laws 18. (SB 2336)
Enacted March 19, 1999. *Effective March 19, 1999.*
Appropriates additional funds to the Department of Environmental Quality for the purpose of defraying the Department's expenses for the fiscal years 1999 and 2000, especially to support ongoing efforts to determine the total maximum daily loads (TMDLs) of pollution of impaired waters in the State.

1999 Mississippi Laws 304. (SB 2833)
Enacted March 1, 1999. *Effective March 1, 1999.*
Amends § 19-5-151 to allow certain municipal areas to incorporate as a water, sewer, garbage, or waste collection and disposal district.

1999 Mississippi Laws 308. (HB 906)
Enacted March 8, 1999. *Effective March 8, 1999.*
Authorizes certain municipalities near Sardis Lake to enter into an agreement with the United States to acquire or lease real property, whether within or outside the corporate boundaries of such municipality, to develop parks, tourism and recreational facilities and supporting infrastructure.

1999 Mississippi Laws 311. (SB 2402)
Enacted March 8, 1999. *Effective March 8, 1999.*
Amends § 49-4-39 by removing the repealer on the regulation of hunting, fishing and wildlife viewing, guide and outfitter services by the Department of Wildlife, Fisheries and Parks. The commission shall prescribe the form and types of licenses for those activities and shall establish fees for the types of licenses, provided that the fee for guide services licenses does not exceed $150 and the fee for outfitters licenses does not exceed $250.

1999 Mississippi Laws 337. (SB 2821)
Enacted March 15, 1999. *Effective March 15, 1999.*
Amends the Aquaculture Act of 1988 (§§ 79-22-15 and 79-22-23) to reflect the reorganization of the Department of Wildlife, Fisheries and Parks and the Department of Marine Resources, to authorize Marine Resources to regulate marine aquaculture programs, and to remove marine aquaculture from the jurisdiction of the Department of Wildlife, Fisheries and Parks.

1999 Mississippi Laws 374. (HB 653)
Enacted March 16, 1999. *Effective July 1, 1999.*
Reenacts §§ 91-7-47, 91-7-63, 91-9-9, 91-9-107, and 93-13-15, all of which authorize trustees, executors, guardians and other fiduciaries to utilize their positions to ensure compliance with environmental laws by those over whom they are in charge.

1999 Mississippi Laws 381. (HB 1422)
Enacted March 16, 1999. *Effective July 1, 1999.*
Creates a voluntary scenic streams stewardship program, administered by the Department of Wildlife, Fisheries and Parks, to promote conservation of streams that possess unique values. The stewardship program is voluntary and nonregulatory with an emphasis on local education, participation and support to maximize conservation efforts and to build and maintain a sense of stewardship among stream users and riparian landowners.

Once the Department evaluates a stream and determines it meets the eligibility criteria, and the Legislature enacts legislation approving the eligibility, local stream advisory councils are established to study whether a particular stream should be nominated for inclusion as a scenic stream. The Department and advisory council must develop a stewardship program which identifies uses along the stream and goals, objectives and action strategies to address the management of resources along the stream.

The Act also authorizes the Department to conduct a pilot program for several streams designated as eligible for inclusion in the State Scenic Streams Stewardship Program. Riparian landowners entering into a binding agreement for the management of lands in a pilot project shall be eligible for any subsequent incentives that are offered for participation in the State Scenic Streams Stewardship Program.

1999 Mississippi Laws 385. (HB 560)
Enacted March 17, 1999. *Effective June 30, 1999.*
Reenacts the Groundwater Protection Trust Fund to levy an environmental protection fee on motor fuels.

1999 Mississippi Laws 386. (SB 561)
Enacted March 17, 1999. *Effective June 30, 1999.*
Amends § 51-3-3 to extend its repealer date of July 1, 1999 to July 1, 2000, on the provision that defines "established minimum flow" as applied to the surface waters of the State.

1999 Mississippi Laws 387. (HB 759)
Enacted March 17, 1999. *Effective July 1, 1999.*
Reenacts §§ 69-21-101 to 69-21-125 to establish the State Board of Agricultural Aviation, responsible for supervising the aerial application of agricultural applications in the State, promoting cooperation between applicators and the Department of Agriculture and Commerce, for licensing of persons engaged in such application of pesticides, poisons, seeds and chemicals, and for registering all agricultural aircraft and pilots.

1999 Mississippi Laws 392. (SB 2536)
Enacted March 16, 1999. *Effective July 1, 1999.*
Amends § 21-17-1 to allow municipalities to lease surplus property to non-profit corporations at less than fair market value.

1999 Mississippi Laws 397. (SB 2825)
Enacted March 16, 1999. *Effective July 1, 1999.*
Amends § 49-7-3 to revise requirements for proof of residency and domicile to receive a resident hunting or fishing license.

1999 Mississippi Laws 401. (SB 2935)
Enacted March 16, 1999. *Effective July 1, 1999.*
Amends § 49-7-13 to clarify that a holder of a trapping license may catch and sell certain skins during trapping season.

1999 Mississippi Laws 402. (SB 2958)
Enacted March 16, 1999. *Effective March 16, 1999.*
Amends § 17-17-407 to allow landfilling of waste tires until July 1, 2000.

1999 Mississippi Laws 421. (SB 2156)
Enacted March 19, 1999. *Effective March 19, 1999.*
Amends § 25-9-120(2) to create the Personal Service Contract Review Board, upon which the Executive Directors of the Department of Wildlife and Fisheries and the Department of Environmental Quality sit to regulate the solicitation and selection of contractual services by the State Board of Education.

1999 Mississippi Laws 431. (HB 826)
Enacted March 19, 1999. *Effective March 19, 1999.*
Amends § 95-5-29 to increase the time to recover damages for cutting trees without consent to 24 months from the injury.

1999 Mississippi Laws 437. (SB 2153)
Enacted March 19, 1999. *Effective March 19, 1999.*
Creates the Metro Recreational Highway Authority to study use of the Pearl River Levee System for public roads and recreation.

1999 Mississippi Laws 450. (SB 3105)
Enacted March 19, 1999. *Effective March 19, 1999.*
Amends § 27-31-1 to exempt from *ad valorem* taxation property owned by nonprofit corporations created in response to the Oil Pollution Act of 1990 if the nonprofit corporation: (1) is tax exempt; (2) assists in the implementation of the contingency plan created in response to the Oil Pollution Act; (3) engages primarily in programs to contain, clean up and mitigate spills of oil or other substances in U.S. coastal or tidal waters; and (4) uses the property for these purposes.

1999 Mississippi Laws 454. (HB 1670)
Enacted March 22, 1999. *Effective March 22, 1999.*
Provides for the issuance of bonds to fund the Water Pollution Control Emergency Loan Program to assist political subdivisions in making emergency improvements to water pollution abatement projects.

1999 Mississippi Laws 464. (SB 3208)
Enacted March 29, 1999. *Effective March 29, 1999.*
Creates the 1999 Department of Wildlife, Fisheries and Parks Improvements Fund for monies from the issuance of general obligation bonds to pay the costs of capital improvements, renovation, or repair to existing facilities, furnishing or equipping facilities, and purchasing real property for public facilities for specific Wildlife, Fisheries and Parks projects.

1999 Mississippi Laws 472. (HB 1309)
Enacted March 25, 1999. *Effective July 1, 1999.*
Requires the State Department of Health to annually develop a list of nonviable and potentially nonviable community public water systems and provide free technical assistance to those systems.

1999 Mississippi Laws 479. (HB 537)
Enacted March 29, 1999. *Effective June 30, 1999.*
Reenacts §§ 51-3-101 through 51-3-105, which establish the laws regarding the Mississippi Water Resources Advisory Council and revises the council's membership structure.

1999 Mississippi Laws 490. (HB 997)
Enacted March 31, 1999. *Effective July 1, 1999.*
Amends § 97-33-107 to allow the Gaming Commission to assess fees on the proceeds of electronic bingo machines and pull-tab machines and to remove the requirement that a lessor obtain a license from the Commission.

1999 Mississippi Laws 512. (HB 852)
Enacted April 15, 1999. *Effective July 1, 1999.*
Amends §§ 93-11-153 through 93-11-163 to authorize the suspension of a noncustodial parent's licenses, including the noncustodial parent's hunting and fishing licenses, when he or she fails to answer a subpoena or respond to a summons, to delete

see Update, pg. 14

the requirement that a contempt citation be obtained before license suspensions are ordered, and to delete the requirement for interagency agreements for license suspension enforcement purposes.

1999 Mississippi Laws 519. (HB 1304)
Enacted April 16, 1999. *Effective July 1, 1999.*
Amends § 49-15-29 to clarify that all commercial seafood licenses shall expire on the same date, to delete the requirement that the Commission on Marine Resources shall inspect certain seafood landings and to revise the license requirements and fees charged for catching, taking or transporting fish in state waters.

1999 Mississippi Laws 527. (SB 2860)
Enacted April 15, 1999. *Effective July 1, 1999.*
Enacts the Statewide Scientific Information Management Act of 1999, which creates a Scientific Information Management System Coordination Council to develop and prepare a plan for the development and implementation of a management system to allow scientific information to be collected, processed, analyzed, managed, updated and accessed by users of the information. Members of the Council include the Executive Directors of the Department of Environmental Quality, Wildlife, Fisheries and Parks, Marine Resources, and Chairman of the Mississippi Water Resources Advisory Council. The plan is due November 15, 2000.

1999 Mississippi Laws 551. (SB 2436)
Enacted April 21, 1999. *Effective April 21, 1999.*
Reconstitutes the membership and extends the life of the Joint Natural and Scenic River Study Committee for one year. The Committee Report is due to the Legislature by January 4, 2000.

1999 Mississippi Laws 558. (SB 2756)
Enacted April 21, 1999. *Effective April 21, 1999.*
Amends § 49-15-15 to provide the Commission on Marine Resources with full jurisdiction over marine aquatic life, and regulate any matters pertaining to seafood , suspend the issuance of licenses when necessary to impose a moratorium to conserve a fishery resource, monitor and maintain artificial fishing reefs in the marine waters of Mississippi and adjacent federal waters, accept donations for such reefs, and apply for any federal permits necessary for their construction or maintenance. Amends § 49-15-16 to authorize the Commission to develop a limited entry fisheries management program. Amends § 49-15-17 to establish the "Artificial Reef Program Account" to construct, monitor or maintain artificial reefs.

1999 Mississippi Laws 565. (SB 2982)
Enacted April 21, 1999. *Effective July 1, 1999.*
Amends § 19-5-177 to allow water and sewer districts to provide for the installation of residential sewage holding tanks and requiring the districts to maintain those tanks.

1999 Mississippi Laws 566. (SB 3029)
Enacted April 21, 1999. *Effective April 21, 1999.*
Authorizes the creation of shoreline and beach preservation districts and allows landowners to petition for the creation of such districts. The purpose of a district is to provide for the planning, design, construction, operation, maintenance and improvement of shoreline and beach improvement projects, including habitat restoration in Harrison and Hancock counties.

1999 Mississippi Laws 571. (SB 2717)
Enacted April 22, 1999. *Effective July 1, 1999.*
To delete the requirement for forfeiture of the hunting, trapping and fishing privileges of a person convicted of hunting, trapping, or fishing without a license but to include an administrative fee.

1999 Mississippi Laws 573. (SB 2891)
Enacted April 22, 1999. *Effective July 1, 1999.*
Amends § 49-17-28 to designate the Permit Board as the state agency to act on water quality certifications required under the Clean Water Act and to require the Permit Board to delegate the issuance of certain water quality certifications to the Department of Environmental Quality.

1999 Mississippi Laws 585. (SB 2804)
Enacted April 22, 1999. *Effective July 1, 1999.*
Transfers the duties, powers, personnel, and resources of the Marine Law Enforcement Division of the Department of Wildlife, Fisheries and Parks to the Department of Marine Resources, amends §§ 49-4-7, 49-15-3, -11, -21, -301, and 63-11-19 to conform to such changes, and amends § 49-15-21 to clarify the police powers of the Marine Law Enforcement Officers.

1999 Mississippi Laws 950. (SB 3228)
Enacted April 1, 1999. *Effective April 1, 1999.*
Authorizes the Adams County Board of Supervisors to impose fees of 3.2% of the monthly gross revenue of gaming vessels which dock in the county.

1999 Mississippi Laws 953. (SB 3233)
Enacted April 1, 1999. *Effective April 1, 1999.*
Authorizes the Board of Supervisors of Jackson County to establish a wetlands mitigation bank for the purpose of offsetting wetlands losses to development and use.

1999 Mississippi Laws 998. (HB 1703)
Enacted April 5, 1999. *Effective April 5, 1999.*
Amends Chapter 970, Local and Private Laws of 1997, to authorize the Board of Supervisors of Jackson County, acting through the Jackson County Port Authority, to extend the water and sewer services of Sunplex Light Industrial Park outside the park in order to make such services available to commercial service, general business, and residential development.

Lagniappe *(a little something extra)*

Around the Gulf . . .

Norman Haigh of Natchez, Mississippi and Jonesville, Louisiana recently was awarded the **1999 National Wetlands Award** for Land Stewardship and Development for his dedication to restoring the productivity of farmland in the Lower Mississippi Valley including managing a row-crop farm as a model for conservation.

Florida environmentalists defeated Coastal Petroleum Company's efforts to obtain twelve **offshore drilling permits** in Gulf areas when an administrative law judge determined that Coastal had failed to provide sufficient information about the environmental impacts of the drilling.

In April, the Florida keys National Marine Sanctuary Advisory Committee met to discuss the projected use of a **$500,000 restitution settlement** to restore and further protect the sanctuary area. The funds were part of the agreement between Royal Caribbean Cruise Lines and the federal government related to the illegal discharge of oil into Florida waters and the subsequent falsification of records.

Members of the five gulf states governmental, NGO, and academic communities came together in Ocean Springs, MS, in April to discuss the development of **aquatic nuisance management plans** aimed at curtailing the environmental and economic threat of the introduction of non-indigenous species into the region.

Around the Nation and the World . . .

The National Marine Fisheries Service has adopted the **Code of Angling Ethics** to promote ethical fishing behavior and implement the public education requirements of President Clinton's 1995 Executive Order regarding the management of recreational fisheries.

In April, the Commerce Department announced that the United States will adopt a **new dolphin-safe label** standard for tuna caught by the encirclement of dolphins in the Eastern Tropical Pacific Ocean authorizing its use if the tuna are caught in the presence of dolphins, provided that none are killed or seriously injured.

The International Maritime Organization and the United Nations Conference on Trade and Development recently completed drafting of a new **Convention on Arrests of Ships**, an agreement that would give national authorities the right to seize ships that, among other things, present a pollution threat.

Reacting to the recent World Bank estimate that government subsidies to promote fishing total $11 billion to $20 billion annually, Australia, Iceland, New Zealand, and Philippines joined the United States in proposing a **curb on fishing subsidies** at the World Trade Organization environmental conference.

Following the declaration of a **national hake fishing emergency**, thousands of Argentine fishermen protested outside Congress in Buenos Aires this June in an effort to get legislators to overturn a hake fishing ban aimed at rebuilding depleted stocks. The bill would lift the hake ban for small and mid-sized fishing ventures and relegate large local and foreign fishing operations to waters 200 miles from the coast north of the 48th parallel.

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Coastal Zone 99

San Diego, CA • July 24-30, 1999

This year's conference, entitled "The People, the Coast, the Ocean: Vision 2020," addresses four issues: the Human Dimension, the Ocean Realm, the Watershed Perspective, and the Public Connection. Call (617)287-5570 to register or visit http://omega.cc.umb.edu/~cz99/main.html

The Missing Links

Rather than spend your research time running through hundreds of search engine results, connect to the Sea Grant Legal Program website for dozens of ocean and coastal sites. We've marked those WATER LOG articles that have additional information available on the internet with this symbol: Just connect to **www.olemiss.edu/pubs/waterlog** and hit the Coastal Links button to access the sites. Contact us to suggest additional links! Some new additions to our Coastal Links page are listed below.

EPA BEACH Watch - includes updates of the latest beach surveys, scientific research, and governmental efforts to strengthen U.S. beach water protection programs and water quality standards.

National Marine Sanctuary Information - includes an announcement of the new navigation system installed to protect coral reefs in the Florida Keys National Marine Sanctuary.

National Marine Fisheries Service Proposed Rules - includes recent rules regarding proposed buyback programs and fishing gear restrictions.

Thomas - Federal Legislative Information - a service of the Library of Congress, includes legislation, Congressional Record, Committee Information - a great way to keep up with the latest ocean and coastal initiatives in Washington.

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