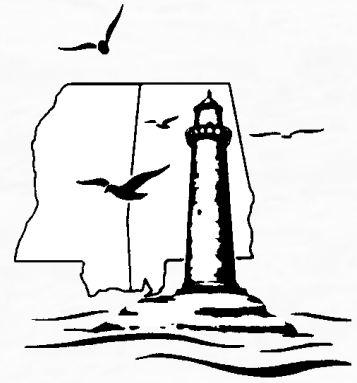


# WATER LOG

A Legal Reporter of the Mississippi-Alabama  
Sea Grant Consortium



## Mississippi and Alabama Reach TMDL Consent Decrees

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

Under the Clean Water Act, states were to establish standards for water quality by 1979 under the Total Maximum Daily Load (TMDL) mandate. Over 20 years later, and after more than 15 years of nationwide litigation over the TMDL process, Mississippi and Alabama join more than 20 other states in establishing schedules for meeting the TMDL mandate for the states' polluted waters.

**What is a TMDL?**

A TMDL is the total amount of a pollutant that a body of water can handle *from all sources*. Once a TMDL is calculated, it is used to establish limits on the amount of a pollutant that can be discharged into a waterbody from all sources, while allowing it to meet its designated water quality standard. With the advent of the Clean Water Act (CWA) in 1972, Congress's main aim to reduce and eliminate pollution of water resources was through

the reduction and regulation of point source pollution. The TMDL process puts increased attention on other sources of water pollution, such as pollutants from nonpoint sources such as farms, lawns and others unregulated by the act.

Clean Water Act section 303(d) establishes a method for controlling TMDLs. It states, "Each State shall establish . . . the total maximum daily load . . . established at a level necessary to implement the applicable water quality stan-

*See TMDL, page 7*

## Tribal Fishing Rights Take Precedent in Ninth Circuit

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

With fish stocks declining nationwide and competition to participate in fisheries increasing, courts are the last resort for determining the breadth of rights among commercial, recreational and subsistence fishers. Native American fishers are in a unique position; the United States maintains a trust relationship with the Tribes and they rely upon hundred-year old treaties and aboriginal rights dating back as far as 7,000 years. The Ninth Circuit recently decided two cases involving Native American fishing rights, affirming treaty rights but barring claims of exclusive aboriginal rights. As the Supreme Court declined to review these decisions this year, the decisions stand.<sup>1</sup>

*See Fishing Rights, page 5*

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# U.S., Alabama Reach Inside Plant to Enforce Permit Limits

U.S. v. Gulf States Steel, Inc., 54 F. Supp.2d 1233 (N.D. Ala. 1999).

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

A federal court in Alabama has determined that a Clean Water Act permit can be enforced on the internal wastewater streams inside an industry plant. Gulf States Steel, Inc. (GSSI) operated an integrated steel manufacturing facility in Gadsden and challenged the enforcement of over 1,000 violations of a permit authorizing discharges into both U.S. waters and waters of the facility's wastewater treatment system.

## Discharges Inside a Facility

The Clean Water Act (CWA) precludes the discharge of a pollutant into U.S. waters unless authorized by a permit. To meet the mandate of the CWA, GSSI's predecessor operated under a permit for 5 years and was required to monitor its discharges into Black Creek. When the permit was reissued in 1994, it again authorized direct discharges into Black Creek but also imposed certain limits and monitoring requirements for six additional outfalls located along the facility's internal wastewater treatment system. The outfalls were within the boundaries of the facility and terminated in a holding inside the facility, and then discharged directly into Black Creek. GSSI began

operating the facility in 1995 under the same permit.

When the U.S. filed a complaint against GSSI for discharging pollutants in violation of the permit, GSSI responded that the outfalls inside the facility were not discharges into U.S. waters, precluding enforcement of the permit. The court found that because the permittee failed to seek administrative review of the 1994 permit limitations, GSSI was precluded from doing so after accepting the limitations and discharging under the permit. GSSI contended that it was not challenging the *terms* of the permit but rather the *enforcement* of the internal wastewater stream limitations. The court rejected the dubious distinction between challenging the "enforcement" of a permit and challenging its terms and obligations and found that because GSSI discharges into Black Creek, U.S. waters, it must comply with *all* of the terms of the permit.

## The "Single Operational Upset" Defense

GSSI then argued that while it violated its permit on several occasions, the U.S. over-counted the number of total violations. GSSI relied upon an affirmative defense under the CWA, the Single Operational Upset Defense, which counts simultaneous violations that are a result of a single operational upset as a single violation. The company contended that 95 multi-day violations were attributable to 20 single causes and should be considered 20 single violations. Similarly, it claimed that because a substantial number of its violations were caused by seasonal hot weather, 643 daily violations should be counted as four violations - one each for the summers of 1995 through 1998.

The court refused to reduce the number of violations on either ground. It determined that GSSI failed to take immediate action when an extraordinary event (such as a pipe rupture) occurred and to correct causes that were within its control (such as leakage). It also refused to reduce the remaining 643 violations to four because violations that are long standing, continuous or occur every year are not considered "exceptional incidents," nor was the noncompliance temporary, precluding GSSI from claiming the defense. The court concluded that "GSSI cannot successfully maintain that summer in Alabama constitutes an 'exceptional incident' qualifying for the single operational upset defense." (54 F. Supp.2d at 1248.)



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](mailto: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:*

Jonathan Huth, 3L

Tim Peeples, 3L Stacy Prewitt, 2L

Tammy L. Shaw, 3L Ginger Weston, 2L

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

<http://www.olemiss.edu/pubs/waterlog/>

## From the Editors



Dear Readers,

It has been a great pleasure over the last two years to receive your comments about *Water Log* and the work of the Sea Grant Legal Program. Recently, we received two messages regarding *Water Log* commending us on a useful publication and "keeping us honest" in our reporting of coastal issues. We share them with you below.

~ ~ ~ ~

*When I received the latest issue of Water Log, I realized that Water Log is the one publication that never is placed in the "to read" stack but rather is scanned almost immediately for all those kernels of information you pack into the issue. Thank you.*

*Dr. W.M. von Zharen  
Texas Institute of Oceanography  
Texas A&M University*

~ ~ ~ ~

*The brief reference in Water Log to the Southern Bluefin Tuna (SBT) decision [see Lagniappe, 19:3 WATER LOG p. 15] by the International Tribunal for the Law of the Sea [is subject to ] misinterpretation. The Tribunal's finding in favor of Australia/New Zealand did not include approval of the latter's claim that the Japanese experimental fishing program [EFP] would cause "irreversible" damage to the SBT population. For reasons not disclosed in the order, the Tribunal said its order was designed to avert "further deterioration" in the stock. The Tribunal's view that the EFP would cause deterioration of SBT abundance is not explained in the order, which is mostly a statement of conclusions, almost entirely devoid of*

*supporting argument or explanation. Since the entire purpose of the EFP was to reduce a major part of the uncertainty about SBT abundance, the Tribunal's conclusion that Japan's EFP program caused deterioration in stock abundance defies explanation, especially since the Tribunal expressly conceded that its assessment of the scientific evidence was not conclusive. The whole point of the EFP was to reduce uncertainty and to establish that SBT abundance was larger than assumed.*

*William T. Burke  
Professor of Law Emeritus  
University of Washington*

~ ~ ~ ~

(Professor Burke noted that "these remarks should be considered in light of the fact that I have been a consultant on the Japanese side of this case." For those interested in the Southern Bluefin Tuna case, visit: [http://www.un.org/Depts/los/TTLOS/Tuna\\_cases.htm](http://www.un.org/Depts/los/TTLOS/Tuna_cases.htm).)

The Legal Program staff and I appreciate the time you take out of your schedules to inform us of your needs, our accomplishments and ways we can improve.

Beginning in January, 2000, the Legal Program will bid adieu to John Duff (see below) and I will assume the role of Director. It has been an honor to work with John and I appreciate the strengths he has brought to the Program and to the *Water Log* publication. The staff joins me in thanking him for his diligence and expertise and wishing him well in his pursuits in the ocean and coastal field.

Best wishes to our readers in the new year,

*Kristen Fletcher*  
Editor

## Anchors Aweigh

It's been four years since I came on board at the Mississippi-Alabama Sea Grant Legal Program and *Water Log*. During that time, I've benefitted from the support and encouragement of the many individuals who make up the University of Mississippi and Sea Grant communities. The greatest aspect of my tenure here has been the continuing opportunity to expand upon my work researching ocean and coastal law and policy issues. New challenges are the life blood of learning. It is for that same reason that I accepted a position at the University of Maine's Marine Law Institute commencing in the Fall of 1999. I am certain that my experience here will serve me well as I embark on new opportunities in the field. I am confident that as Kristen Fletcher takes over on January 1, 2000, she will benefit from the same support and friendship that make the Directorship of the Program more than just a job.

Thank you,  
*John A. Duff*

(Editor's note: John Duff can be contacted via e-mail at: [jduff@usm.maine.edu](mailto:jduff@usm.maine.edu).)



# U.S. and Canada Forge Salmon Agreement

## *Legislative threats to pact deterred*

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

In an effort to breathe new life into the Pacific Salmon Treaty, the United States and Canada crafted an abundance-based management agreement in June that is part of a bilateral effort to ensure that management of salmon stocks is based on sound scientific principles and measurements. Larger catches will be allowed when salmon abundance is higher, and catches will be constrained in years when abundance is down. The agreement also funds efforts to conserve salmon habitat.

The pact faced some opposition by members of Congress who threatened to withhold funding and curtail efforts to implement measures designed to manage certain stocks of salmon designated as endangered. Those threats diminished as the president and other congressional delegations countered that the pact and its funding mechanisms were vital to reconciling longstanding salmon disputes.

The 1999 agreement's abundance-based regime replaces the fixed-catch ceilings of the original Treaty and its implementing measures.<sup>1</sup> It is hoped that this type of regime will be more responsive to the conservation requirements of salmon stocks than the fixed ceilings. United States Special Negotiator James Pipkin outlined additional provisions of the agreement to Congress, indicating that the agreement is designed to:

- constitute a long-term solution to the recent conflicts;
- insulate science from politics
- integrate the concerns of Washington, Oregon, Alaska and 24 U.S. Treaty Tribes;
- provide a framework for cooperative cross-border fishery management;
- harmonize fisheries management with endangered species concerns; and,
- resolve disputes in the U.S. between Indian and non-Indian fishers<sup>2</sup>

In late October, President Clinton noted "[t]he Agreement ends years of contention between the U.S. and Canada regarding expired fishing harvest restric-


tions and provides for improved fisheries management. I am pleased that legislative riders that would have hindered implementation of this important Agreement have been modified or removed from the bill. In addition, funds have been provided for implementation of the Agreement and for other salmon recovery efforts. These funds will allow us to work cooperatively with our partners - Canada, a number of western States, and Treaty Tribes - to implement the Agreement and to restore Pacific coastal salmon runs."<sup>3</sup> ✓

### ENDNOTES


1. D. Waldeck and G. Buck, *The Pacific Salmon Treaty: The 1999 Agreement in Historical Perspective*, Congressional Research Service Report for Congress (June 18, 1999).
2. Congressional Testimony to the Subcommittee on Fisheries, Conservation, Wildlife and Oceans of the House Committee on Resources, 106<sup>th</sup> Cong. (October 28, 1999) (statement of James Pipkin, Department of State Special Negotiator).
3. The United States has recently entered into the U.S.-Canada Pacific Salmon Agreement. Memorandum by President to House of Representatives, M2 PRESSWIRE (October 27, 1999).

### WORLD WIDE WEB PACIFIC SALMON TREATY RESOURCES

Pacific Salmon Agreement Materials related to the June 30, 1999 signing (Released by the Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State)

 [http://www.state.gov/www/global/oes/oceans/990630\\_salmon\\_index.html](http://www.state.gov/www/global/oes/oceans/990630_salmon_index.html)

Summary of the Pacific Salmon Agreement Reached by United States and Canadian Negotiators (Fact Sheet released by the Bureau of Oceans and International Environmental and Scientific Affairs, June 3, 1999)

 [http://www.state.gov/www/global/oes/oceans/fs\\_990603\\_salmon.html](http://www.state.gov/www/global/oes/oceans/fs_990603_salmon.html)

Pacific Salmon Agreement materials (By the Department of Fisheries and Oceans - Canada)

 [http://www.ncr.dfo.ca/pst-tsp/agree/toc\\_e.htm](http://www.ncr.dfo.ca/pst-tsp/agree/toc_e.htm)

*Fishing Rights from page 1*

### **Tribal Claim to the OCS**

#### **Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9<sup>th</sup> Cir. 1998).**

Five Alaskan native villages (Native Villages) brought action against the Secretary of Commerce challenging fishing regulations and asserting aboriginal title which includes exclusive hunting and fishing rights to portions of the U.S. outer continental shelf (OCS) in Prince William Sound, the Gulf of Alaska, and the lower Cook Inlet regions of Alaska. The Native Villages based their claim of exclusive rights on occupancy and use of the OCS over a 7,000 year period and the fact that a majority of their members still depend upon hunting and fishing the OCS to maintain their subsistence lifestyle.

The challenge came as a result of 1993 regulations, pursuant to the Magnuson Fishery Conservation Act<sup>2</sup> and the Northern Pacific Halibut Act of 1982,<sup>3</sup> which limited access to halibut and sablefish fisheries in the Gulf of Alaska and the lower Cook Inlet. The regulations required that any commercial fishing boat have an Individual Fishing Quota (IFQ) permit which specified the fishing quota assigned to the vessel. These regulations allowed non-tribal members to fish within the Native Villages' aboriginal territories but prohibited tribal members without an IFQ permit from fishing in the waters. The district court held that the U.S. holds sovereign title to the area and that there is no exclusive aboriginal right to fish in navigable waters outside of a treaty or federal statute. The Native Villages appealed.

The Ninth Circuit Court of Appeals agreed with the lower court that as a matter of law, the federal government has sovereign control and paramount rights in offshore waters. The Ninth Circuit pointed to Supreme Court precedent in which the federal government and individual states battled over ownership and control of the territorial sea and submerged lands.<sup>4</sup> In such conflicts, the Supreme Court has consistently found that control over coastal waters, submerged lands, and the marginal sea is necessary to regulate foreign affairs, commerce, and national defense.

The Native Villages attempted to distinguish their claim of aboriginal title from the state claims by asserting that aboriginal title is not legal title. Rather, aboriginal title presumes some federal control and the exclusive right to use and occupy the territory does not interfere with the federal government's sovereign title.

While acknowledging that aboriginal rights could coexist with federal interests,<sup>5</sup> the court concluded that a claim of *exclusive* hunting and fishing rights in offshore waters conflicted with the federal government's interests and the Native Villages could not assert exclusive rights to use and occupy the OCS areas.<sup>6</sup>

### **Tribal Claim to Shellfishing**

#### **United States v. State of Washington, 157 F.3d 630 (9<sup>th</sup> Cir. 1998).**

The United States and sixteen western Washington Tribes (Tribes) brought suit seeking a declaration of the nature and extent of tribal shellfishing rights as a direct consequence of the increasing competition for, and depletion of, the shellfish resource. The issue is unique as many of the tidelands to which the Tribes seek access are now held in private ownership and private landowners, as well as commercial shellfish cultivators, sought to preclude the Tribes from the lands and existing oyster beds. The Tribes relied upon their rights as set out in the Stevens Treaties of 1855 which reserved certain rights to fishing resources in Washington waters. The district court granted 50% of the shellfish harvest in Washington waters to the Tribes<sup>7</sup> but, in a separate proceeding, limited this right by precluding tribal harvesting on cultivated beds and by applying restrictions on the tribal harvest from privately-owned land.<sup>8</sup>

In determining the issues on appeal, the Ninth Circuit first reviewed the Stevens Treaties of 1855 which reserved to the Tribes the "right of taking fish, at all usual and accustomed grounds and stations." These rights were limited by the "Shellfish Proviso" that provided "however, that they shall not take shellfish from any beds staked or cultivated by citizens."<sup>9</sup> The commercial growers argued that this proviso should preclude the Tribes from all shellfish beds that were "in some fashion improved by human labor."<sup>10</sup>

The district court determined that this precluded the Tribes from taking shellfish from artificial, or planted, shellfish beds but not natural beds that had been cultivated. The Ninth Circuit agreed, finding that to exclude the Tribes from shellfish beds that were improved by human labor would violate the spirit of the Treaty which provided "the one significant promise . . . by the United States to the Indians [is] that they would enjoy a permanent right to fish as they always had."<sup>11</sup>

*Fishing Rights from page 5*

The court's ultimate determination was that the Tribes' right to harvest in the commercial growers' beds is limited to a 50% harvest allocation of entirely naturally propagated beds. For enhanced beds, the Tribes are entitled to 50% of the pre-enhanced sustainable shellfish production. The court failed to elaborate on how to determine such an allocation, but remanded the case to the district level for implementation.

The appellants also argued that tribal harvesting amounts to the Tribes acquiring property rights in the state tidelands in violation of the Equal Footing Doctrine which, upon statehood, gave states the power to grant rights in or to dispose of certain shore lands subject to the federal interest in navigation and commerce. The court rejected this argument, relying on Supreme Court precedent that the Equal Footing Doctrine had no effect upon the treaty rights of the Tribes, and granted the Tribes the right to harvest shellfish on public tidelands. The Tribes were also granted the right to harvest on privately-held tidelands because "the Supreme Court has made clear that the Tribes' fishing rights in their usual and accustomed places are not diminished by private ownership of those lands."<sup>12</sup> The court granted deference to the Tribes' treaty rights because "treaties enjoy a unique position in our law."<sup>13</sup>

These decisions settle some issues regarding tribal fishing rights in the Ninth Circuit but tribal rights will remain contentious as the competition for fish and other marine resources intensifies among all users nation-wide. ♡

#### ENDNOTES

1. *See Native Village of Eyak v. Daley*, 119 S. Ct. 2337 (1999) (cert. denied); and *Puget Sound Shellfish Growers v. United States*, 119 S. Ct. 1377 (1999) (cert. denied).
2. 16 U.S.C. §§ 1802-1882 (1999).
3. 16 U.S.C. §§ 773-773k (1999).
4. *See United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 669 (1950); *United States v. Texas*, 339 U.S. 707 (1950); and *United States v. Maine*, 420 U.S. 515 (1975).
5. *Village of Gambel v. Hodel*, 869 F.2d 1273 (9<sup>th</sup> Cir. 1989).
6. 154 F.3d at 1097 (9<sup>th</sup> Cir. 1998).
7. 873 F. Supp. 1422 (W.D. Wash. 1998) (Shellfish I).
8. 898 F. Supp. 1453 (W.D. Wash. 1998) (Shellfish II).
9. 157 F.3d at 638-39.
10. *Id.* at 648.
11. *Id.* at 648-49.
12. *Id.* at 646.
13. *Id.* at 649. In order to cross over private land to access shellfish beds, the Tribe must prove the unavailability of other forms of access.

## *In Hot Water:*

### *Decision by Canada's Supreme Court heats up tensions between native and non-native lobster fishermen*



Tribal fishing rights are in question in Canada as well as the U.S. On September 17, the Canadian Supreme Court ruled that a 1760 treaty between the British and Native Tribes gave the Mi'kmac and Maliseet people of Nova Scotia and New Brunswick the right to catch and sell fish year round even though the commercial fishing season is limited for non-native fisherman. The decision sparked distrust, animosity, and violence between native and non-native fishermen. After the decision, many native fishermen resumed lobster fishing. Fearing the natives would deplete lobster stocks, non-native commercial fishermen retaliated by destroying the natives' lobster traps. Tensions were eased when more than 700 non-native fishermen voted to allow fisherman leaving the industry to sell six lobster licenses to native fishermen. In exchange, the native fishermen agreed to observe the commercial fishing season.

*TDML, from page 1*

dards.”<sup>1</sup> States must identify those waters that do not meet water quality standards. These waters are listed according to a particular use (such as recreational or industrial) and prioritized according to the severity of pollution and the importance of the body of water.<sup>2</sup>

The next step is to determine the quantity of a specific pollutant, the total maximum daily load, that can be discharged into the waterbed without exceeding the water quality standard. The calculation for a TMDL looks like the following:

Waste Load Allocation (point source pollutants)  
 + Load Allocation (nonpoint source pollutants)  
 + Margin of Safety  
 + Room for Growth  
 Total Maximum Daily Load

Once this loading capacity is determined, the state then allocates the loading among both point and nonpoint sources. Finally, the states must limit pollution to the levels set by the TMDLs, allocating the allowable amount of pollution quantified by a TMDL among the different dischargers and instituting pollution controls to assure that this level is not exceeded.

### Litigation & Settlements

Section 303(d) is not new to the CWA - TMDLs have been a part of the statute since 1972 and were due in 1979. However, the mandate was largely ignored while efforts focused on point source pollution. As a result, beginning in the early 1980s, environmental groups began filing lawsuits to force the EPA, in lieu of the states, to establish lists of impaired water bodies (called “303d lists”) and promulgate TMDLs. This litigation continues today and has led the EPA to develop a policy requiring its Regional Administrators to set schedules with the states for TMDLs. The EPA also convened a Federal Advisory Committee which recommended regulations on TMDLs to address implementation and other issues.

In December, 1997, the Sierra Club sued seeking an order to compel the EPA to establish TMDLs for all listed waters in Mississippi.<sup>3</sup> This litigation has resulted in a consent decree ordering the EPA to set pollution limits within five years for 470 polluted water segments, including pollution limits within three years for 30 water bodies that have significant pollution levels or special environmental values. For the remaining 232 water segments, pollution limits will be set within 10 years.

Similarly, the Alabama Rivers Alliance, Homewood Citizens Association and private citizens sued to compel the EPA to establish TMDLs in Alabama.<sup>4</sup> The resulting consent decree gives the state lead responsibility for the establishment of TMDLs within five years after the consent decree (in 1998).

### The Future of TMDLs

The nationwide litigation surge may not be complete, however, as there is active debate on whether Congress intended for nonpoint pollution sources to be included in the TMDL. Some contend that section 303(d) was designed to include such pollution but others claim that Congress has addressed nonpoint source pollution in other sections of the CWA and that it is impossible to account for all nonpoint sources and accurately assign portions of the TMDL.

Where does this leave us? The EPA has issued a draft proposal on identifying impaired waters and establishing TMDLs<sup>5</sup> which has been criticized as too prescriptive and costly for the states. According to the Mississippi Department of Environmental Quality (DEQ), Mississippi is addressing TMDL program needs by creating a state-wide watershed offensive called Basin Planning. According to Barry Royals of the DEQ, Mississippi is divided into five basin groups with one DEQ member serving as Basin Coordinator and in charge of a team comprised of representatives of state and Federal resource agencies. The Basin Team then embarks on the five-part Basin Planning process: 1) Planning; 2) Monitoring and Data collection; 3) Determination of Pollutant Sources; 4) Allocation of Reduction; and 5) Implementation.

Others are calling for the creation of special watchdog committees on each waterway, recognizing that the TMDL process rivals the most ambitious anti-pollution initiatives in the nation’s history. ✓

*For information on the status of states’ TMDL progress and litigation, see the EPA TMDL page at <http://www.epa.gov/OWOW/tmdl/>.*

### ENDNOTES

1. 33 U.S.C. § 303(d)(1)(C) (1999).
2. The “importance” of a body of water is determined by its use such as human use, industrial use, etc.
3. *Sierra Club v. Hankinson*, No. 97-CV-3683-MHS (N.D. Ga. 1998).
4. *Mudd, et. al. v. Hankinson, Alabama Rivers Alliance v. Hankinson*, No. CV-97-S-2518-M (N.D. Ala. 1998).
5. 40 C.F.R. § 130 (1999).

# Mississippi Responds to Coastal Growth and EPA Stormwater Rule

## *DMR, NOAA Develop Coastal Resource Management Plan*

*Jay Charland, NOAA*

Mississippi's Gulf coast has experienced rapid growth in population and economic activity since the advent of dockside gaming in 1994. In response, the Mississippi Department of Marine Resources (DMR), the lead agency for the State's Coastal Management Program, hosts the Comprehensive Resource Management Plan (CRMP). The CRMP seeks to balance natural resource protection and economic development through cooperation among local, state, and federal agencies and the private sector. The CRMP Team is also responding to a new EPA Stormwater pollution rule that will impact coastal cities.

### **History and Motivation for the CRMP**

Mississippi's casino resort industry began in 1989, when cruise vessels with gaming paraphernalia were permitted in the Mississippi Sound. The vessels opened casinos as they cruised beyond the state's boundaries, into U.S. and international waters. This proved problematic, however, as it was difficult to determine how much income was earned within Mississippi and subject to state taxes. By 1990, legislation allowed vessels to remain docked on the Mississippi River or on the Gulf and operate casinos.

While gaming remains legal for vessels cruising the waters of Mississippi, casino operators have found it advantageous to locate casinos on stationary vessels, usually barges, and to locate hotels and other amenities near the casino. Thus, the Gulf coast resorts feature casino barges, hotels, parking lots or structures, and other infrastructure generally within ¼ mile of the water. The casino industry has grown steadily since the first casino opened in 1994, and casino revenue on the coast should pass \$1 billion in 1999.<sup>1</sup> Growing along with the industry, the Gulf coast's population and economy has reached unprecedented levels with new residents coming to the coast to find work in the casinos or other businesses.<sup>2</sup>

As the casino industry expands, there are fewer non-sensitive locations available for placement of casino resorts. The permitting of casino developments in areas not foreseen as casino sites prompted the

Commission on Marine Resources to direct the DMR to develop guidelines for coastal planning, and to evaluate the future impacts on coastal resources of casino construction and associated economic expansion. Charged with this challenge, the DMR began development of a Comprehensive Resource Management Plan (CRMP).

The CRMP began with meetings between federal, state, and local regulatory agencies, and coastal counties and cities to discuss impacts of development. The CRMP has grown to include over 60 organizations and agencies, representing most of the private and public interests on the Mississippi coast. The CRMP is envisioned as an aid to local planning entities to assist in evaluating the long-term and environmental impacts of their decisions, and to help guide future development toward the least overall impact on coastal resources.

### **CRMP's Current Projects**

The CRMP is currently working on four projects: stormwater management; land availability analysis; a Coastal Development Strategies Conference; and water quality versus watershed development analysis.

*Stormwater Management.* All eleven cities and three counties along the coast are required by the EPA to develop stormwater management programs under implementation phase II of the NPDES permit program for Municipal Separate Storm Sewer Systems (called MS4; see page 10). The CRMP is working to facilitate and assist local governments develop and implement their programs. The CRMP staff is collecting stormwater management programs from around the southeast and the nation which, along with the technical assistance available from EPA, will be used to craft stormwater programs for the coast.

The CRMP is also investigating the idea of creating a stormwater management district on the coast. Mississippi law provides for the creation of special districts to manage water and wastewater. The principal advantages of a district are stable, independent funding, simplified administration, and the ability to work across existing political boundaries and on a watershed basis. A single stormwater management district would



simplify administration of the programs, and provide a separate, stable source of funding for stormwater programs.

*Land availability Analysis.* The CRMP has conducted two analyses on population growth and land availability in the coastal counties to ascertain how much land is available for development and how much land will be required in the coming decades. The first study, based on census tracts, allocates new population to census tracts that are below their maximum capacity. Capacity is determined by multiplying the maximum population density within a tract by the tract's area. This analysis demonstrates that there is sufficient room to accommodate the expected population growth over the next several decades.

The second study assesses where developable land is located. Using GIS analysis techniques, land in Hancock County was parsed into three categories: land unavailable for development, land with no constraints, and land with potential environmental constraints such as wetlands and floodplains. Looking only at land with no constraints and specifying that new developments occur near an existing major road or sewer system, the analysis determined that there are over 23,000 acres of undeveloped land in Hancock County meeting the criteria. At an average population density of just over 3.5 persons per acre, Hancock County would be able to accommodate over 80,000 new residents while locating them near existing infrastructure and away from important natural areas. Population in Hancock County is expected to grow by 16,500 over the next 20 years.

*Coastal Development Strategies Conference.* Most neighborhoods lack parks, open space, nature trails, and other outdoor recreation areas because typical subdivision designs result in rectangular grids of street and lots, with all land taken up by houses, yards, and streets. Using seed money from the EPA, the CRMP will sponsor a Coastal Development Strategies Conference on March 23-24, 2000, to discuss alternatives to traditional subdivision design. The symposium, featuring planner and landscape designer Randall Arendt, will explain to landowners, developers, realtors, and lenders ways to design subdivisions that preserve open space. Studies have shown that subdivisions featuring nature trails, playgrounds, scenic wild areas, or other open areas experience greater initial and long-term property value.

Subdivisions avoiding wetlands also reduce flood damage.

*Water Quality v. Watershed Development Analysis.* Development in a watershed, particularly residential development using septic tanks, likely results in greater water pollution, especially nutrients and pathogens. Few studies and little data exist to quantify the impacts to a watershed from increasing development. The CRMP, using satellite imagery and water quality data for the Bay of St. Louis, will develop a measure of watershed development and relate that measure to water quality parameters in the bay and its tributaries to help avert future water quality problems.

### CRMP Products & the Future

The most challenging aspect of the CRMP is the development and dissemination of a comprehensive vision for managing growth on the Gulf coast. As the CRMP Team develops that vision, relevant aspects will be published along with the data necessary to its support or implementation, including reports that describe the data or tool, how it was developed, and how it may be used. In this way, it is hoped, at the end of the current period of intense activity by the CRMP Team, a comprehensive vision for the Mississippi Gulf coast will have already been developed, published, and implemented.

*Jay Charland is a Coastal Management Specialist with the Coastal Programs Division of NOAA. A graduate of Oregon State University and the University of California at San Diego, Jay worked for the Tillamook Bay National Estuary Project in Oregon prior to moving to Mississippi. Jay is currently on loan to the Department of Marine Resources to assist with the CRMP and related projects. You may contact him at DMR, (228) 374-5000 or through the DMR website at <http://www2.datasync.com/dmr/>.*

### ENDNOTES

1. Mississippi Gaming Commission Report, available at <http://www.msgaming.com/>.
2. For population reports, see U.S. Census Bureau Report, available at <http://www.census.gov/main/www/cen1990.html>. See also Estimates of 1998 population in Mississippi counties, available at [http://www.census.gov/population/estimates/county/co-98-1/98C1\\_28.txt](http://www.census.gov/population/estimates/county/co-98-1/98C1_28.txt).

# EPA Phase II Rule Takes Effect: Municipal Stormwater Management Program

Since 1972, the Clean Water Act (CWA) has prohibited the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized by a National Pollutant Discharge Elimination System (NPDES) permit. Initial efforts to improve water quality under the NPDES program primarily focused on reducing pollutants in industrial process wastewater and municipal sewage. As pollution control measures for industrial wastewater and municipal sewage were implemented and refined, it became increasingly evident that more diffuse sources of water pollution were also significant causes of water quality impairment. Specifically, storm water runoff draining large surface areas, such as agricultural and urban land, was found to be a major cause of water quality impairment.

In 1987, Congress amended the CWA to require implementation, in two phases, of a comprehensive program for addressing stormwater discharges. Phase I of the program was promulgated in 1990 and requires permits for stormwater discharge from a large number of priority sources including municipal separate storm sewer systems ("MS4s") generally serving populations of 100,000 or more and several categories of industrial activity, including construction sites that disturb five or more acres of land.

This fall, the EPA released its Phase II Stormwater requirements to expand the existing Phase I requirements to address storm water discharges from small MS4s serving less than 100,000 persons and construction sites that disturb one to five acres. The goal is that the implementation of the six minimum measures should reduce pollutants in urban storm water and help to reduce erosion of streambeds, improve quality of waters, and provide benefits to wildlife and endangered and threatened species, tourism benefits, and biodiversity. Stormwater management programs are required to have the following six elements.

1. *Public education and outreach on storm water impact:* a public education program to distribute educational materials to the community (or conduct equivalent outreach activities) about the impacts of stormwater discharges on waterbodies and the steps to reduce stormwater pollution.

2. *Public involvement/participation:* opportunities for the public to participate in program development and implementation. Public participation could take the form of serving as citizen representatives on a local stormwater management panel; attending public hearings; working as citizen volunteers to educate other individuals about the program; or participating in volunteer monitoring efforts.


3. *Illicit discharge detection and elimination:* the owner or operator of a storm sewer system would be required to effectively prohibit through ordinance, order, or similar means, to the extent allowable under state law, illicit discharges into the separate storm sewer system, and implement appropriate enforcement procedures and actions as needed.

4. *Construction site stormwater runoff control:* owners or operators of regulated small MS4s must develop, implement, and enforce a pollutant control program to reduce pollutants in stormwater runoff from construction activities that result in land disturbance of one acre or more.

5. *Post-construction stormwater management in new development and redevelopment:* owners or operators of regulated storm sewer systems must develop, implement, and enforce a program to address stormwater runoff from new development and redevelopment projects to their municipal separate storm sewer systems using site-appropriate and cost-effective management practices.

6. *Pollution prevention/good housekeeping for municipal operations:* to ensure that municipal activities are performed in the most appropriate way to minimize contamination of storm water discharges.

The EPA has also called for "Satisfaction of Minimum Measure Obligations." This provision allows permittees to share minimum control measures with other governmental entities. Region-wide cooperative efforts to comply with some or all of the above six control measures appear to be possible under this section. ✓

*The EPA rule can be found at 64 Federal Register 68722 (December 8, 1999) or on the Internet at  <http://www.epa.gov/owmitnet/sw/phase2/index.htm>.*

# Unavailability of Permit No Defense to Runoff in Eleventh Circuit

**Driscoll v. Adams**, 181 F.3d 1285 (11<sup>th</sup> Cir. 1999).  
*Tammy L. Shaw*, 3L

The Eleventh Circuit recently found a landowner liable for damages from runoff under the Clean Water Act (CWA) even though the necessary stormwater discharge permit was not available. The suit was brought by upland landowners after timber harvesting and development left a mountain stream choked with mud, silt and sand. The court held that the resultant stormwater runoff was a pollutant under the CWA, leaving the landowner responsible even though the state did not issue general stormwater permits.

The plaintiffs owned property on a Georgia mountain with ponds fed by the Spiva Branch stream. Defendant Adams began harvesting timber, cutting and grading roads, and placing pipes to route stormwater runoff downhill through the Spiva Branch. The development resulted in erosion of mud, sand and other materials washing into the plaintiffs' ponds. The damage and the failure of Adams to seek proper regulatory approval led the plaintiffs to seek relief.

Under the CWA, a discharger must obtain a permit to authorize certain discharges of pollutants.<sup>1</sup> A developer like Adams can obtain a general stormwater permit (which applies to a class of dischargers) or an individual stormwater permit (which applies to an individual discharger) for stormwater runoff. In addition, for discharges from a point source such as a pipe or concentrated area, a developer must obtain a point source permit. Because Georgia had not issued general stormwater permits, Adams successfully argued that compliance with the CWA placed an impossible condition upon him, relieving him of liability under the statute.

## The Appeal

The plaintiffs appealed, arguing that Adams could have obtained other permits in lieu of the general stormwater permit, including an individual stormwater permit and a point source discharge permit. This appeal raised two issues: (1) whether the CWA prohibition on pollutant discharge applies when a permit is not available; and (2) whether the stormwater discharge in this case is included under the CWA.

To decide the issues, the Eleventh Circuit applied the following test. A discharger without a permit is

excused from liability if four factors are present: (1) compliance with the CWA discharge prohibition is impossible; (2) no permit is available; (3) the discharger complies with local pollution control requirements; and (4) the discharges are minimal.<sup>2</sup> The court found that Adams' discharge failed to meet two requirements: first, Adams did little to limit erosion and runoff before construction and neglected to seek any permits until after damage to the adjacent properties; and second, the stormwater discharge and damage were substantial, amounting to about 64 tons of sediment deposited into the plaintiffs' ponds. While obtaining a general stormwater permit would have been impossible for Adams under the circumstances, the court held that it was feasible for him to meet the four requirements. Thus, Adams was not excused from liability.

## Defining "Pollutant" and Nonpoint Source Pollution

Adams further argued that the stormwater runoff from his property did not constitute a "pollutant" under the provisions of the CWA. The court found otherwise, citing federal regulations that list "rock, sand, cellar dirt, and industrial, municipal, and agricultural waste . . .", as pollutants.<sup>3</sup> In addition, the court followed precedent holding that rain water falls within the description of "pollutant" when it is flowing from a site where land-disturbing activities are conducted.

Finally, Adams argued that the stormwater runoff of his property did not constitute discharge from a "point source" and that the Spiva Branch was not a navigable waterway. The court disagreed, finding the pipes and dams used to channel runoff to be clearly discernible point sources. Because the CWA broadly defines navigable waters, the court found no indication that Congress intended to exclude small tributaries that flow intermittently, such as the Spiva Branch.

This case confirms that developers in Georgia, Florida and Alabama must make efforts to limit stormwater discharge before beginning development and obtain permits when available. ✓

*For a review of the EPA stormwater discharge rule, see page 10.*

## ENDNOTES

1. 33 U.S.C. § 1342(a)(1) (1999).
2. See *Hughey v. JMS Development Corp.*, 78 F.3d 1523 (11<sup>th</sup> Cir. 1996).
3. 40 C.F.R. § 122.2 (1999).

# Property Rights in *Titanic* Salvaged

**R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943 (4<sup>th</sup> Cir. 1999).**

*Ginger M. Weston, 2L*

As we enter a new century, our fascination with the history found in shipwrecks from previous centuries is growing and historic principles of maritime law remain important to determine the rights to shipwrecks in both U.S. and international waters. The Fourth Circuit Court of Appeals recently applied U.S. jurisdiction to the wreck site of the *Titanic*, located 400 miles off the coast of Newfoundland in international waters. On appeal from an injunction granting exclusive rights in the wreck to the Florida corporation R.M.S. Titanic, Inc. (RMST), the court affirmed jurisdiction over the wreck, but limited the scope of salvage rights outside U.S. waters.

## The Historic Salvage Principle & *Titanic*

The wreck of the *Titanic* was discovered in 1985 lying in international waters. Two years later, a private venture undertook the first salvage and sold the recovered artifacts and the interest in the wreck to RMST which filed an action to secure its rights to the wreck under the doctrine of salvage. The doctrine requires RMST as the salvor to demonstrate that, without an obligation to do so, it aided a distressed ship and salvaged part of the ship or cargo. For providing these services, the doctrine entitles RMST to an exclusive claim to the property and the right to retain all property until one fifth of the recovery has been collected. A right in any future salvaged property is also granted for a reasonable time.

U.S. courts have the authority to settle competing salvage claims if the court has jurisdiction over the parties to the suit or if the salvor brings the salvaged property into the custody of the court. Because the *Titanic's* location is beyond U.S. maritime borders, bringing the entire property before the court was physically impossible. Thus, the court's jurisdiction rested on the principle that possession of a part of the ship can equal possession of the whole.

## Claims to the *Titanic*

To make its salvage claim, RMST presented artifacts from the wreck to the Federal District Court of the Eastern District of Virginia to establish jurisdiction over the *Titanic*. RMST was granted exclusive salvage rights to the wreck and the site, as well as sole ownership of the artifacts. The court found that possession of some of the wreck was sufficient to constructively possess the entire wreck and establish U.S. federal jurisdiction.

When challenged in 1996 by a salvage competitor, the jurisdiction of the court and injunction were upheld to prohibit any other search, survey, or salvage operations at the wreck or site.<sup>1</sup> RMST's right to exclude observers from the area surrounding the wreck site was challenged in 1998, when Deep Ocean Expedition (DOE) planned to carry passengers into the North Atlantic to view and photograph the *Titanic*. Several parties asserted claims, and

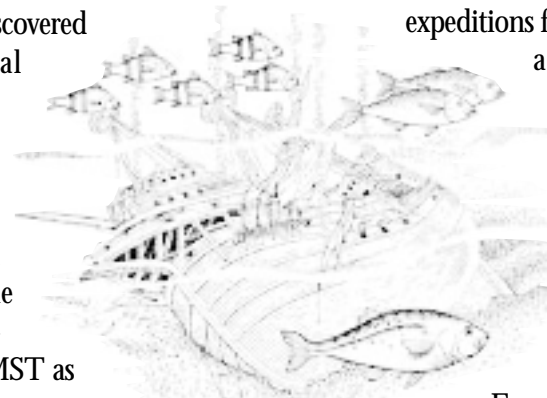
RMST won a motion to prevent DOE and similar expeditions from entering the wreck site, including a 168-square-mile rectangular zone around the site.<sup>2</sup>

## Fourth Circuit Appeal

DOE and one of its passengers, Haver, appealed the 1998 decision. They claimed the district court had no jurisdiction over them as parties or over the wreck itself.

Even if jurisdiction existed, DOE & Haver argued, the terms of the injunction which prohibited viewing or photographing the wreck or site were overly broad. RMST responded that safety concerns in the North Atlantic, the need to protect its substantial investments in the operation, and the public interest in preventing unorganized salvage of the *Titanic* warranted the right to exclude others from the area.

The Fourth Circuit affirmed the exercise of jurisdiction over the wreck in international waters, recognizing presentation of artifacts as a sufficient basis for jurisdiction over the whole of the shipwreck site. The court relied on international decisions noting the importance of such jurisdiction in facilitating salvage operations and compared it to the jurisdiction used over foreign vessels beyond territorial waters to facilitate customs control and national defense.





# 1999 Federal Legislative Update

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

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

## 106 Public Law 31 - 1999 Emergency Supplemental Appropriations Act

(H.R. 1141)

Provides the following:

- Funds are available for the Conservation Reserve Program and Wetlands Reserve Program and for states that have been materially affected by the commercial fishery failures;
- Funds may *not* be used to issue or renew a fishing permit or authorization for any fishing vessel greater than 165 feet, of more than 750 gross tons, or that has engine capability of producing more than 3,000 shaft horsepower to engage in fishing for Atlantic mackerel or herring unless the fishery management council and Secretary of Commerce approve such fishing;
- The limitation on registered length contained in 46 U.S. Code section 12102 (for documentation purposes) shall not apply to a vessel used solely in any menhaden fishery which is located in the Gulf of Mexico or along the Atlantic coast south of the area under the authority of the New England Fishery Management Council; and
- Amendments to the Department of the Interior and Related Agencies Appropriations Act of 1999 extend the date by which individuals must establish that they have engaged in commercial fishing for Dungeness crab in Glacier Bay National Park in order to receive compensation from the U.S. and to authorize funds to compensate U.S. fish processors, crew members, communities, and others negatively affected by fishing restrictions in the Park.

## 106 Public Law 53 - Water Resources Development Act of 1999

(S.B. 507)

Authorizes the United States Army Corps of Engineers to construct various projects for improvements to rivers and harbors including the following:

- (§ 106) a project for aquatic ecosystem restoration and reef restoration along the Gulf coast of Mississippi;
- (§ 213) a review of the shore management program "with particular attention to inconsistencies in implementation among the divisions and districts of the Corps of Engineers";
- (§ 215) the establishment of a National Coastal Data Bank within 2 years to log data on the geophysical and climatological characteristics of the shores of the U.S. to include data regarding current and predicted shore positions, information on federally authorized shore protection projects, and data on the movement of sand along the shores of the United States, including impediments to such movement caused by natural and manmade features;
- (§ 301) the completion of the Tennessee-Tombigbee Waterway Wildlife Mitigation Project in Alabama and Mississippi;
- (§ 331) environmental infrastructure, Jackson County, Mississippi;
- (§ 369) a project for navigation on the Black Warrior and Tombigbee Rivers, to acquire land for mitigation of the habitat losses attributable to the project, including the navigation channel, dredged material disposal areas, and other areas directly affected by construction of the project;
- (§ 421) a study to determine the feasibility of using dredged material from maintenance activities at Federal navigation projects in coastal Louisiana to benefit coastal areas in the State;
- (§ 429) a study to determine an alternative plan for dredged material management for the Pascagoula River portion of the project for navigation at the Pascagoula Harbor;
- (§ 459) a plan to address water resource and related land resource problems and opportunities in the upper Mississippi and Illinois River basins, from Cairo, Illinois, to the headwaters of the Mississippi River, in the interest of systemic flood damage reduction including flood control and floodplain management strategies; maintenance of the navigation project; management of bank caving and erosion; watershed nutrient and sediment management; habitat management; and recreation needs;
- (§ 515) technical planning and design assistance to non-Federal interests and other site-specific studies to formulate and evaluate fish screens, fish passages devices, and other measures to decrease the incidence of juvenile and adult

*Federal Legislation from page 13*

fish inadvertently entering irrigation systems and for a report due not later than 2 years after the date of enactment of this Act regarding fish mortality caused by irrigation water intake devices; appropriate measures to reduce fish mortality; the extent to which those measures are currently being employed in arid States; the construction costs associated with those measures; and the appropriate Federal role, if any, to encourage the use of those measures;

- (§ 558) funds for the Mississippi River Commission; and
- (§ 559) the development of a management strategy to address problems with toxic microorganisms and the degradation of ecosystems in U.S. tidal and nontidal wetlands and waters.

**106 Public Law 60 - Energy and Water Development Appropriations Act, 2000** (H.R. 2605)

Appropriates funds for energy and water development including harbors, flood control, beach erosion and the implementation of an administrative appeals process for the Corps of Engineers Regulatory Program. It also provides funds for the preparation of studies and analyses of the impacts on Regulatory Branch workload and on the cost of compliance by the regulated community of proposed replacement permits for the nationwide permit 26 program.

**106 Public Law 78 - Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2000** (H.R. 1906)

- Provides funds up to \$1,000,000 to carry out the purposes of the Endangered Species Act including efforts to relocate endangered or threatened species to other suitable habitats and making Emergency Watershed Protection funds available for Mississippi, New Mexico, Ohio, and Wisconsin for financial and technical assistance for pilot rehabilitation projects of small, upstream dams; and
- Provides funds for emergency disaster assistance for the Northeast commercial fishery failure under the Interjurisdictional Fisheries Act of 1986 to support research and management activities administered by the National Marine Fisheries Service and the New England Fishery Management Council.

**106 Public Law 108 - Arctic Tundra Habitat Emergency Conservation Act** (H.R. 2454)

Directs the Secretary of the Interior to implement rules to reduce the overabundant population of mid-continent light geese to ensure the biological diversity of the ecosystem which North American migratory birds depend.

**106 Public Law 113 - District of Columbia Appropriations Act, 2000** (H.R. 3194)

- *National Park Service Studies Act of 1999* (§ 326)  
Calls for studies of the geographical areas and historic and cultural themes of specific areas including coastal areas in California, Puerto Rico, and the Carolinas; and
- *Mississippi National Forest Improvement Act of 1999* (§ 401)  
Authorizes improvements and acquisitions of lands for national forests in the State of Mississippi.

**106 Public Law 116 - Coastal Barrier Resources System Map** (S. 1398)

Clarifies certain boundaries relating to the Coastal Barriers Resources System, off the coast of North Carolina.

**106 Public Law 156 - Designation of Dugger National Wilderness** (H.R. 2632)

Designates certain federal lands in the Talladega National Forest in the State of Alabama (approximately 9,200 acres), as the Dugger Mountain Wilderness and a component of the National Wilderness Preservation System.

**106 Public Law 167 - John H. Chafee Coastal Barrier Resources System Act** (S. 1866)

Recognizes Senator John H. Chafee as a leading voice for the protection of the environment and the conservation of the natural resources of the nation and redesignates the Coastal Barrier Resources System as the "John J. Chafee Coastal Barrier Resources System". ✓

# Lagniappe *(a little something extra)*




## *Around the Gulf . . .*

The Gulf of Mexico Fisheries Management Council is considering implementation of a temporary moratorium on the issuance of **charter vessel/headboat permits** to fish the EEZ for reef fish and coastal migratory pelagics (mackerel) fish in the hopes of developing a more comprehensive effort limitation program for the recreational fishery. The Council will hear additional testimony at the Jan. 19 meeting in Fort Walton Beach, Florida.

The Gulf region was well-represented in the 1999 Walter B. Jones Memorial and NOAA Excellence Awards for Coastal and Ocean Resource Management.

Coastal Steward of the Year	Dr. George Crozier, Dauphin Island Sea Lab, AL
Volunteer of the Year	Les Hodgson, Brownsville, TX
Non-Governmental Org. of the Year	The Galveston Bay Foundation, TX
Excellence in Business Leadership	The Houma-Terrebonne Chamber of Commerce, LA
Excellence in Local Government	Cameron Parish Police Jury, Cameron Parish, LA

For information about the awards and winners, visit  [www.nos.noaa.gov/jones\\_award.html](http://www.nos.noaa.gov/jones_award.html).




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



This fall, the **California State Lands Commission** approved the termination of three state oil and gas leases located off the coast of Santa Barbara County, making these offshore areas part of California's Marine Sanctuary and protecting them from future oil and gas leasing and development. There are 17 leases in state waters still producing oil and gas.

In November, Washington voters defeated Initiative 696, a measure which would have eliminated **non-tribal net fishing** in state waters by banning 18 types of commercial fishing gear from state waters. Advocates hoped the initiative would support efforts to save wild salmon.

The National Marine Fisheries Service has addressed the requirements of a court order to clarify its plans to protect **Steller sea lion populations** while allowing the pollock fishery to continue. The NMFS plans to reduce competition between sea lions and the fishery by dispersing the fisheries over time (stretching them out) and space (extending their size) and protecting Stellers around rookeries and major haulouts. See  [www.nmfs.gov/prot\\_res/main/new.html](http://www.nmfs.gov/prot_res/main/new.html) .

Based on biological evidence that **wild Atlantic salmon** in the United States are in danger of extinction, the Fish and Wildlife Service and National Marine Fisheries Service have proposed listing the species as endangered under the Endangered Species Act. A bi-agency report concluded that Atlantic salmon stocks indigenous to Gulf of Maine rivers, the last known remaining naturally reproducing populations in the United States, remain at very low levels and face continuing threats including aquaculture, fish disease, habitat modification, and catch-and-release fishing. ✓

*Titanic from page 12*

The court added that this type of jurisdiction is imperfect because property in international waters is shared with other nations and thus granted "nonexclusive control" over the wreck to RMST. RMST then held the right to prevent others from interfering with its salvage or conducting search, survey or salvage operations of their own as long as it continues the salvage operation. However, the court reversed the grant of exclusivity to visit, observe and photograph the salvage site as an erroneous expansion of traditional salvage law. Finally, the grant of exclusive rights to passage in international waters was also reversed and characterized by the court

as an alarming expansion of salvage law frustrating free navigation on the high seas.

The U.S. Supreme Court declined to hear the appeal in October of 1999.<sup>3</sup> Thus, the Fourth Circuit decision stands, clarifying the scope of rights available to salvors to include rights to the actual wreck, but limiting the authority to grant exclusive control over international waters and prevent free navigation in open seas. Although no other party may enter the *Titanic* site to search, survey, salvage or interfere with RMST's efforts, expeditions like DOE's are well within their international and maritime rights to visit, view and photograph wreck sites with ongoing salvage operations. ✓

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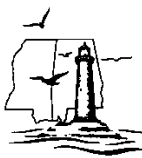
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*This publication is printed on recycled paper.*

#### ENDNOTES

1. *Titanic I*, 924 F. Supp. 714, 722-24 ( E.D. Va. 1996).
2. *Titanic II*, 9 F. Supp.2d 624, 634 (E.D. Va. 1998).
3. *R. M. S. Titanic, Inc. v. Haver*, 120 S. Ct. 74 (1999) (cert. denied).



## WATER LOG

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

