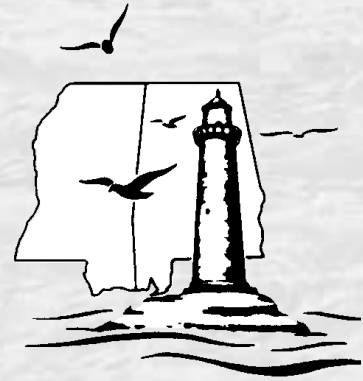


WATER LOG

A Legal Reporter of the Mississippi-Alabama
Sea Grant Consortium



Supreme Court Invalidates Corps' Migratory Bird Rule

Solid Waste Agency v. United States Army Corps of Eng'rs, 2001 WL 15333 (2001).

John L. Treadwell, 2L

In a 5-4 decision, the United States Supreme Court held that the Corps exceeded its jurisdiction when it extended the definition of navigable waters to include intrastate waters inhabited by migratory birds. Because the Corps failed to demonstrate Congress' acquiescence to the migratory bird rule, the Court refused to grant administrative deference to Corps' interpretation of the Clean Water Act (CWA).

Background

The Solid Waste Agency of Northern Cook County (SWANCC)¹ purchased an abandoned sand and gravel quarry in order to construct a non-hazardous waste landfill. Before construction could commence, SWANCC had to dredge and fill several excavation trenches and ponds that had become home to migratory birds during the site's abandonment. When SWANCC initially inquired about the need for a 404(a) permit, the Corps denied authority over the site because it did not contain wetlands. However, the Corps claimed jurisdiction when it was later informed that several species of migratory birds inhabited several ponds around the quarry. The

See Migratory, page 7

FERC Approves Natural Gas Pipeline through Gulf Marine Habitat

David N. Harris, Jr., 2L

On February 22 the Federal Energy Regulatory Commission (FERC) granted approval to Gulfstream Natural Gas Pipeline, L.L.C. for construction of a 744 mile natural gas pipeline in the Gulf of Mexico.¹ The pipeline will stretch from the southern tip of Mississippi and Alabama to Florida crossing through Gulf of Mexico essential fish habitat and marine reserve areas.² The pipeline will supply natural gas to sites of future gas powered electric generation plants planned to meet Florida population growth over the next 30 years. Gulfstream plans to begin construction in June after submitting mitigation plans to counter damage to the marine environment in the Gulf.

See Pipeline, page 12

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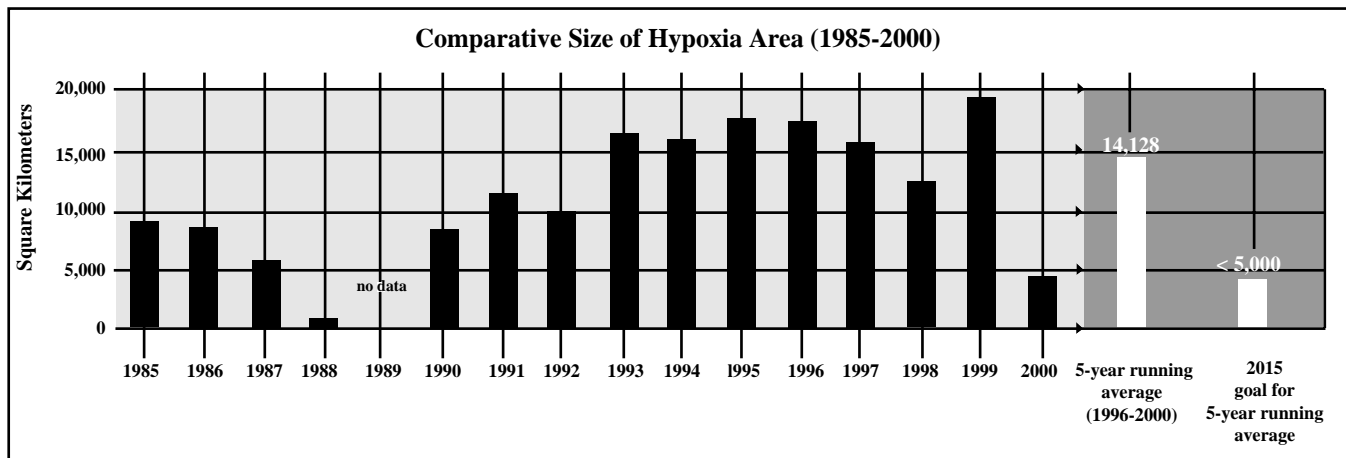
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Action Plan Calls for a Reduction in the Dead Zone

Jimmy Hall, 3L

On January 18, 2001, the Mississippi River/Gulf of Mexico Watershed Nutrient Task Force (Task Force) submitted an Action Plan to Congress detailing measures aimed at reducing the size and duration of

and causing aquatic species to either perish or abandon the area. Alarming, the amount of nitrogen entering the Northern Gulf has reached an all time high, resulting in the dead zone averaging more than 14,000 square kilometers over the past five years, nearly double that of a decade ago. As a result of this



the hypoxic zone in the northern Gulf of Mexico. The hypoxic zone, often referred to as the "dead zone," occurs each summer when an excessive amount of nitrogen originating in the Mississippi/Atchafalaya River Basin (River Basin) flows into the northern Gulf, depleting the oxygen levels,

disturbing increase, Congress passed the Harmful Algal Boom and Hypoxia Research and Control Act, requiring the Task Force to form the Action Plan implementing measures for "reducing, mitigating, and controlling hypoxia in the northern Gulf of Mexico."¹

The Action Plan focuses on reducing the nitrogen loads in the northern Gulf by calling on the States, Federal agencies, and Indian Tribes to implement practical, cost-effective measures aimed at diminishing the runoff and discharge of nutrients in the upper River Basin. The Action Plan is based upon five principles; 1) encouraging actions that are voluntary, practical and cost effective, 2) utilizing existing state and federal regulatory programs, 3) following adaptive management schemes, 4) identifying funding needs and resources, and 5) providing measurable outcomes outlined in the three long-term goals (See box at bottom of adjoining page).

The Task Force admits that the Action Plan is a complicated proposal due to scientific uncertainty, the extent of the area involved and the number of States, Tribes and Federal agencies implicated. Nevertheless, this complexity is mitigated by incorporating conventional programs such as the Clean Water Act, Water Resource Development Acts, Farm



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

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Letter from the Editor

Hello *Water Log* Readers,

Since joining the Mississippi-Alabama Sea Grant Legal Program in March of 2000, I have anticipated this moment and am thrilled and honored to take over the helm as Editor of *Water Log*. With this program's strong leadership and steadfast dedication to informing readers on legal issues that affect the coasts, I am confident that *Water Log* will continue to be an important and informative publication. We constantly strive to make each issue useful and practical and I hope to make our work more of a collaborative effort by inviting insights and ideas drawn from the vast interests and expertise of our subscribers and readers.

As an Alabama native, I have a special affinity for the gulf coast area. I grew up in a small town that prac-



tically straddles the Mississippi-Alabama state line and have spent many happy days in the coastal towns of both states. I remember when the Alabama coast was made up of quiet beachfront towns and I have watched the Mississippi Gulf Coast grow and change in so many ways. There are many unique opportunities and special problems to be addressed in managing the rich resources of Alabama, Mississippi and the Gulf of Mexico.

I look forward to carrying on the *Water Log* tradition of keeping our readers up to date on recent judicial decisions, new state and federal legislation and regulatory changes and a variety of other issues that impact our coasts and our nation. I invite you to contact me with your suggestions and comments, or just to say "hello" and I look forward to serving as your editor.

Sincerely,

Tammy Shaw

Dead Zone, from page 2

Bills and the Coastal Wetlands Planning, Protection, and Restoration Act into the Action Plan.

The Action Plan is designed to be flexible, affording significant discretion to each State, Tribe and Federal agency in the development of programs tailored to the amount of nutrients being discharged from specific areas. Given the Plan's flexibility, and the continuing commitment to scientific research

and monitoring, the drafters believe that the hypoxic zone can be controlled, noting that even the slightest reduction in nutrients entering the northern Gulf will benefit the marine life in the affected area. ✓

ENDNOTE:

1. Public Law 105-383 section 604.

Long-term Goals of Action Plan

- **Coastal Goal:** By the year 2015, subject to the availability of additional resources, reduce the 5-year running average areal extent of the Gulf of Mexico hypoxic zone to less than 5,000 square kilometers through implementation of specific, practical, and cost-effective voluntary actions by all States, Tribes, and all categories of sources and removals within the Mississippi/Atchafalaya River Basin to reduce the annual discharge of nitrogen into the Gulf;
- **Within Basin Goal:** To restore and protect the waters of the 31 States and Tribal lands within the Mississippi/Atchafalaya River Basin through implementation of nutrient and sediment reduction actions to protect public health and aquatic life as well as reduce negative impacts of water pollution on the Gulf of Mexico.
- **Quality of Life Goal:** To improve the communities and economic conditions across the Mississippi/Atchafalaya River Basin, in particular the agriculture, fisheries, and recreation sectors, through improved public and private land management and a cooperative, incentive-based approach.

To read the final action plan, visit www.epa.gov/msbasin/actionplan.htm.

EPA Proposes “Special Ocean Sites”

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

In January, the EPA proposed amendments to existing regulations implementing the ocean protection provisions of Clean Water Act § 403 which provides that permits for discharging into ocean waters must meet EPA guidelines. The EPA proposed the rule to protect coastal waters that are under great threat from industrial and municipal pollution and because “[h]ealthy oceans are essential to the Nation’s economy and natural heritage.”¹ They are currently under review and, if approved by the new EPA Administrator, will be sent out for public comment. The proposed changes represent what may be the last vestiges of the Clinton administration’s efforts to focus federal attention on healthy ocean waters.

The proposed changes would provide for establishment of baseline water quality standards for ocean waters beyond three miles offshore, strengthen the requirements for a permit to discharge into ocean waters, and establish Special Ocean Sites (SOSs), areas within ocean waters that are of outstanding value. The proposed rule notes that offshore ventures such as aquaculture, biotechnology, oil and gas drilling and production, and other industrial activities are expanding into new areas of the ocean and “many will need to discharge wastewater as part of their operations.”² When discharging into ocean waters, they must obtain a permit and meet the Ocean Discharge Criteria. The proposed rule represents the first significant changes since the criteria was released in 1980.

Clean Water Act § 403

Entities wishing to discharge into ocean waters that are within the jurisdiction of the Clean Water Act must first obtain a National Pollutant Discharge Elimination System (NPDES) Permit.³ The issuance of this permit is subject to the Ocean Discharge Criteria developed by the EPA which requires dischargers to assess the impact of the proposed discharge on the biological community in the area of the discharge as well as the surrounding biological communities.

The purpose of the criteria is to determine the degradation of the waters by certain types of disposal including analysis of the effect on marine life and

ecosystems, the permanence of the effects, and other locations and methods for disposal.⁴ If the EPA, or in some cases the state authority, determines that the discharge will result in unreasonable degradation of the marine environment, then additional restrictions are imposed including stipulations for temporal criteria such as seasonal limitations on the discharge or process criteria such as the rate of discharge.

Discharges & Healthy Ocean Waters

The original guidelines were promulgated in 1980 but with the new rule, the EPA plans to establish certain protections for federal waters that are analogous to those in state waters. The first effort is to designate all federal ocean waters where there are no applicable CWA water quality standards in place as “Healthy Ocean Waters.” Discharges into Healthy Ocean Waters must meet water quality standards.⁵ For the first time, these areas would have to meet 16 specific water quality criteria, in addition to other conditions necessary to support aquatic life and wildlife, recreational, and aesthetic values.

Special Ocean Sites

The rule also proposes to create new protections for “Special Ocean Sites” that have significant environmental value, including prohibitions for new and expanded ocean development. Special Ocean Sites are defined as sites which are of outstanding ecological, environmental, recreational, scientific, or aesthetic value. To provide a buffer zone, the SOS will include a minimum 1,000 meter wide band of water extending around the area. Under the rule, no permits for new or significantly expanded discharges will be issued for these sites.⁶ However, the President can waive this prohibition on new or expanded permits in the paramount interest of the U.S. such as national security or essential energy development.

EPA is proposing to establish four Special Ocean Sites:

- Flower Garden Banks, located off Texas;
- Gorda Ridge-Blanco Fracture zone, located off Oregon;
- Escanaba Trough of the Gorda Ridge, located off California; and.

- Northern Right Whale Critical Habitat Areas, located off Massachusetts and the Florida/Georgia border.

While the EPA is not proposing an SOS for state waters, the agency is soliciting proposals from states including Florida (the Dry Tortugas National Park), Hawaii (the Northwestern Hawaiian Islands), and California (the Channel Islands National Marine Sanctuary).

The proposal allows for a process in which citizens or states can recommend a site for establishment as an SOS in addition to those proposed by the federal agency. Other such sites can include areas within U.S. jurisdiction that have outstanding value, such as critical habitat established under the Endangered Species Act, high value coral reefs, hydrothermal vents and certain Essential Fish Habitat areas.

The proposal is unique as it represents the first time development activities such as mining, oil and gas exploration, and fish farming in federal ocean waters beyond three miles offshore would have to meet protective new standards under the Clean Water Act. Like many new federal regulations or pending regulations, the EPA proposal is now under review by the new EPA Administrator Christine Todd Whitman, as required by President Bush on January 20, 2001.⁷

To see the proposed rule and an EPA-prepared Fact Sheet, visit http://www.epa.gov/owow/oceans/protecting_oceans/. ✓

ENDNOTES:

1. Proposed Rule at 8.
2. *Id.*
3. 33 U.S.C. § 1342 (2001). Waters under the jurisdiction of the Clean Water Act include the territorial sea, waters of the contiguous zone, and the oceans. *See* 33 U.S.C. § 1343(a) (2001).
4. 33 U.S.C. § 1343(c) (2001). Section (c)(2) provides that “where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines . . . no permit shall be issued. . . .”
5. However, for specific waters where applicable state, territorial, tribal or federal water quality standards are in place, those water quality standards continue to apply. Proposed Rule at 41.
6. “Significantly expanded discharge” means a discharge with a 20% or greater increase in pollutant loadings above the current permit limit.
7. *See* Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (2001).

Bush's Proposed Budget Makes Deep Cuts

On April 9, 2001, President Bush unveiled his first budget saying that it represents “compassionate conservatism.” Under this proposal, federal spending would rise by \$104 billion or 5.6 percent in the fiscal year that begins October 1, 2001. However, many departments, agencies and programs face deep cuts in discretionary spending from current levels.

The budget for protecting the environment and conserving natural resources would be reduced by 6.7 percent, to \$26.6 billion next year. Officials at the Department of Interior and the Environmental Protection Agency voice their support for the President's budget saying that the budget cuts represent reversions to “normal” levels after an unusually high surge in environmental spending in past years.

In terms of new spending, a grant of \$450 million, up from \$90 million this year, would go to states for programs designed to improve recreation and conserve wildlife habitat. Another grant of \$25 million would help finance state efforts to enforce environmental laws, in keeping with an effort to shift some of the responsibility for environmental protection away from the federal government and into the hands of state governments. The proposed budget contains provisions that have environmental groups alarmed, including \$5 million set aside for studies aimed at preparing to drill for oil in the Arctic National Wildlife Reserve.

In the coming months, Congress will carefully examine the proposed budget as appropriation decisions are made for the approaching 2002 fiscal year. To learn more about the President's budget, visit

www.whitehouse.gov/omb/budget/.

Supreme Court Rejects Challenge to the Clean Air Act

Whitman v. American Trucking Association, Inc., 2001 U.S. LEXIS 1952.

Tammy L. Shaw, J.D.

In February, the Supreme Court rejected a challenge to the way in which the Clean Air Act (CAA) is implemented by the Environmental Protection Agency (EPA), ruling that the Agency does not have to consider economic impact when setting air-quality standards. The unanimous court also ruled against industry arguments that in setting these standards, the EPA took lawmaking powers away from Congress in violation of the U.S. Constitution. However, the court ordered the EPA to reconsider those same standards finding the Agency's interpretation of certain CAA provisions unreasonable.

Considering the Cost

Section 109(a) of the Clean Air Act requires the EPA to set national ambient air quality standards (NAAQS) for a specified list of air pollutants and to review and make necessary revisions to those standards at five-year intervals. The statute instructs the Agency to set standards "the attainment of which...are requisite to protect the public health" with "an adequate margin of safety."¹ In 1997, the EPA Administrator revised the NAAQS for ozone and for particulate matter, significantly reducing allowable ozone levels and concentration of soot from cars, power plants and other sources. Industry groups challenged the reduction arguing that the cost of compliance would be staggering and that the Agency should be required to balance the cost of compliance with the public health benefit gained from the revised standards.

The EPA, then under the Clinton administration, argued that the language of Section 109 of the CAA is absolute, instructing the Agency to set air quality standards based on the protection of public health. The Agency points out that while there are other CAA provisions that allow consideration of economic factors, Congress did not intend compliance costs to be considered when establishing or revising NAAQS.

Industry plaintiffs counter that there are many factors other than air-quality standards that Congress intended the Agency to consider in protecting public health, not the least of which is the potential harm of bankrupting whole industries, putting jobs at risk and saddling consumers with increased prices. They argue

that the health of the community was what Congress had in mind and that the language in Section 109, such as "adequate margin" and "requisite" indicates the legislature's consent to consider not only health concerns but compliance cost and other economic issues in setting NAAQS.

The Supreme Court ruled, just as the courts below had, that economic considerations play no role in setting ambient air quality standards. The court cited other provisions of the CAA and subsequent amendments that explicitly describe economic factors that may be considered in administering the CAA, finding that a plain reading of Section 109(a) unambiguously bars cost considerations from the NAAQS process.

Delegation Challenge

The industry groups argue that Section 109 of the CAA lacks sufficient guidelines or criteria for setting air-quality standards and fails to limit the Agency's discretion in implementing Section 109, raising the issue of unconstitutional delegation of legislative powers. Article I of the U.S. Constitution gives all legislative power to the Congress and prohibits any delegation of this power.² The Supreme Court has repeatedly held that when Congress gives decision-making authority to agencies, it must "lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform."³ When Congress enacts legislation that gives an agency authority to carry out that legislation, it must provide sufficient guidelines or an "intelligible principle" for setting regulations and it must limit agency discretion in administering those laws. They argue that the statute, without sufficient guidelines, has been interpreted so broadly by the EPA that the Agency has effectively taken lawmaking decisions into its own hands.

The EPA Administrator argues that the CAA requires that the designation and standards for pollutants be based on the latest scientific knowledge and that those same standards must be at requisite levels to protect public health. This, the Administrator argues, provides the "intelligible principle" for setting pollution standards and sufficiently limits the Agency's discretion in promulgating such regulations.

The court agreed, finding that limits on agency

discretion and the provisions in the CAA provide adequate guidance and that the Agency's standard-setting process falls well within the requirements for non-delegation. The court explained that in its history, improper delegation of power has only been found in two instances, one in which absolutely no limitation on agency discretion existed and another that conferred authority to regulate with essentially no guidelines at all. The court concluded that Section 109 of the CAA fits comfortably within the scope of discretion permitted by precedent and does not pose an unconstitutional delegation problem.

Statutory Construction

The final issue in this case raised questions of statutory construction, interpretation of the CAA and how various sub-parts of the statute interact with subsequent amendments. The industry groups argue that the revised ozone standards are improper because they were implemented under a combination of sub-parts of the CAA and that certain provisions in those sub-parts are contradictory and outdated. The EPA explains that the revised ozone standards were properly established under Subpart 1 of Section 109 and do not conflict with other provisions or subsequent amendments.

The court found that the various CAA sub-parts in question are, in fact, unclear and ambiguous. The court cited longstanding precedent of deferring to agency interpretation when a statute is unclear or ambiguous, as

long as the agency's interpretation is reasonable. However, in this instance the court refused to defer to the Agency's interpretation, finding the NAAQS setting process was unreasonable and instructed the EPA to reconsider the new ozone standards.

Conclusion

The court affirmed the Court of Appeals decision, finding in favor of the EPA on the issue of implementation cost, stating that consideration of compliance costs should play no role in setting air-quality standards under the CAA. The court overturned the lower court decision on the issue of delegation, holding that neither the Act itself nor the Agency's interpretation poses a delegation problem because the statute provides sufficient guidelines and adequately limits EPA's discretion in implementing the CAA. Finally, the court remanded the question of statutory construction, ruling that the implementation of the new ozone standards is unlawful in that it is based on an unreasonable interpretation of the varying sub-parts of the Act and should be reconsidered by the EPA. ♡

ENDNOTES:

1. 42 U.S.C. § 7409(b)(1).
2. U.S. CONST. art. I § 1.
3. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

Migratory, from page 1

Agency invoked jurisdiction based on interpretive guidelines issued by the Corps in 1986 which declared CWA 404 jurisdiction over intrastate waters which are or could be inhabited by migratory birds.²

In an effort to secure the 404 permit, SWANCC submitted numerous plans to mitigate the removal of the migratory birds including, agreeing to keep a great blue heron nesting site intact. Although the Illinois Environmental Protection Agency approved SWANCC's water quality certification, the Corps denied the 404 permit because the group failed to demonstrate that it had adopted the most environmentally safe disposal method. According to the Corps, SWANCC's proposal would subject the public's drinking water to an unacceptable risk because the group did not have enough money reserved to repair possible leaks in the landfill. Additionally, the Corps concluded that damage to the migratory bird habitat could not be miti-

gated because it would be impossible to recreate such a habitat in another area.

When the Corps refused to issue a 404 permit, SWANCC challenged its authority under the Administrative Procedure Act in the U.S. District Court for the Northern District of Illinois. The District Court granted summary judgment in favor of the Corps, and the Court of Appeals for the Seventh Circuit affirmed. The case was appealed to the U.S. Supreme Court.

Corps Authority Under § 404(a) of the CWA

Although Congress recognizes that the individual states are primarily responsible for preventing water pollution, section 404(a) grants the Corps authority to issue permits for the discharge of dredged or fill material into navigable waters. Because Congress defined navigable waters under the CWA as "waters of the United States, including territorial seas," the Corps was left with the

Migratory, from page 7

responsibility of determining the specific waters the definition included. In 1974, the Corps interpreted the CWA as granting them jurisdiction over waters that could be used for interstate commerce or were affected by the tide.³ In 1977, the definition of navigable waters was expanded to encompass isolated waters like wetlands, lakes, and streams based on the reasoning that if these waters were damaged, then interstate commerce would be affected.⁴ The Corps' inclusion of wetlands under the term navigable waters was upheld in United States v. Riverside Bayview Homes, Inc.⁵

With regard to the Corps' interpretation of the CWA, the Court has held that it must defer to the Corps' interpretation of the statute, if that interpretation is reasonable.⁶ Therefore, the Court must decide whether the Corps' interpretation is reasonable and consistent with Congress' expressed intentions under the CWA. According to the Court, the 1977 inclusion of isolated waters under the Corps' jurisdiction is both reasonable and consistent with congressional intent. The Court reasoned that by broadly defining "waters of the U.S., Congress intended to use its Commerce Clause power to regulate some waters that are non-navigable.⁷ Furthermore, when Congress amended the CWA in 1977, it rejected efforts to limit the Corps' inclusion of isolated waters under the CWA. Accordingly, the Corps' incorporation of wetlands into its definition of navigable waters is also supported by Congress' implied acquiescence.

The Migratory Bird Rule and the Commerce Clause

In 1986, the Corps issued interpretative jurisdictional guidelines that further expanded its jurisdiction. These guidelines specifically state that the Agency had permitting jurisdiction over waters that are used to irrigate crops sold in interstate commerce, and waters that are or could be used as a habitat by migratory birds or endangered species. The Corps again based this authority on Congress' Commerce Clause power, in which Congress has the power to regulate activities having a significant affect on interstate commerce.⁸ Because bird-watching is a popular outdoor activity for many individuals, generating revenue and supporting interstate travel and tourism, the Corps reasoned that maintenance of migratory bird habitat falls under its jurisdiction based on the commerce clause authority. While relocating one bird habitat, as in the present case, does not seem to significantly impinge upon commerce, if every state could

relocate bird habitats at will, the aggregate affect would impact interstate commerce.

The Court's Analysis of the Migratory Bird Rule

SWANCC argued that the Corps exceeded its authority under the CWA by asserting jurisdiction over isolated, non-navigable, intrastate waters pursuant to the migratory bird rule. According to SWANCC, section 404(g) reveals only that Congress sought to include non-navigable waters like tributaries and streams that surround navigable waters into the CWA's scope. Furthermore, SWANCC argued, Congress does not have the power under the Commerce Clause to extend the Corps jurisdictional authority to reach the proposed landfill.

The Corps responded by asserting that the migratory bird rule is consistent with Congress' intent in passing the CWA, citing Conference Reports which stated that the phrase "navigable waters" was to be given the most expansive constitutional interpretation possible. The Corps argued that Congress' actions in 1977 further indicated approval of the expanded jurisdiction. First, when Congress refused to invalidate the Corps' expanded definition of navigable waters and again by the language of section 404(g) indicating Congress' endorsement of the incorporation of isolated, non-navigable, intrastate waters into the definition of navigable waters. Furthermore, because Congress has not clearly spoken out against the migratory bird rule, the Corps argued that, as the agency charged with enforcing the CWA, it is entitled to administrative deference.

Corps Exceeded Its Authority

The Court, however, agreed with SWANCC and held that the Corps exceeded its authority under the CWA when it asserted jurisdiction over the landfill pursuant to the migratory bird rule. The Court found that the legislative history cited by the Corps only demonstrated that Congress planned to use its commerce power over navigation in passing the CWA, and the migratory bird rule contradicted the definition of navigable waters that the Corps, itself, promulgated in 1974. Further, the Court found that Congress' failure to limit the Corps' expanded definition of navigable waters in no way evidences support of the migratory bird rule.

Although the Court recognized that 404(g) was intended to include some non-navigable waters, it did not agree that it supports such a broad view that allows the Corps to obtain jurisdiction over isolated, intrastate,

non-navigable waters. The Court refused to grant deference to the Corps' definition of navigable waters saying that when a statutory interpretation "invokes the outer limits" of Congressional authority, Congress must definitively support that agency's interpretation. The Court did not agree that Congress had endorsed the Corps' interpretation, in this instance.

Conclusion

Breaking with the precedent set forth in *Riverside Bayview Homes, Inc.*, the Court limited its review to the CWA text and refused to grant deference to the migratory bird rule. The Court explained that Congress must clearly support the rule because it significantly infringed on traditional state authority over land and water use. The Court also rejected the Corps' argument that the migratory bird rule falls within Congress' power under the Commerce Clause. According to the Court, this approach would require an evaluation of the aggregate effect these activities have on interstate commerce. Without a clear intent by Congress to grant the Corps authority

over the landfill, the Court refused to address these constitutional issues. ✓

ENDNOTES:

1. The Solid Waste Agency of Northern Cook County is a group of twenty-three Chicago area municipalities. The group formed in order to construct a non-hazardous waste landfill.
2. 51 Fed. Reg. 41217.
3. 33 CFR § 209.120(d)(1).
4. 33 CFR § 323.2(a)(5).
5. 474 U.S. 121 (1985).
6. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).
7. The Constitution vests Congress with the authority to regulate commerce among states. U.S. CONST. art. I, § 8 cl. 3. According to the Court, Congress can regulate three broad areas under the commerce clause: (1) avenues of interstate commerce; (2) areas relating to interstate commerce as well as persons or things in interstate commerce; and (3) activities that significantly relate to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).
8. *Id.*

Final "Tulloch" Regulation To Strengthen Wetlands Protection

Adapted from an EPA Press Release

In January, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) signed a final regulation to strengthen wetlands protection. The new rule (65 Fed. Reg. 4550) clarifies the types of activities that are likely to result in a discharge of dredged materials regulated under the Clean Water Act (CWA).

Section 404 of the Clean Water Act requires a permit before dredged or fill material is discharged into wetlands. Mechanized land clearing, ditching, draining and stream channelization has long been problematic under the CWA because of confusion over whether the excavation and spilling of debris associated with these activities constitutes discharge of materials. In 1993, the EPA and the Corps finalized regulations, known as the "Tulloch Rule" defining the "discharge of dredged material" to include the incidental fallback of any excavated materials that occurs during dredging operations.

In 1998, the U.S. District Court of Appeals for the District of Columbia held that the Corps exceeded its

authority in regulating "incidental fallback" and enjoined the Corps from enforcing the rule. Since this decision it is estimated that more than 20,000 acres of wetlands have been destroyed and 150 miles of streams drained and channelized because of confusion over what activities require a permit.

The recent regulation seeks to clear up this confusion, indicating that the Corps and the EPA will regard land-clearing, ditching, channelization, in-stream mining and other mechanized earth moving activities as resulting in a discharge of dredged materials unless project-specific evidence shows the discharge to be only "incidental fallback."

The new rule defines "incidental fallback" in keeping with the 1998 court decision and specifically outlines activities the agencies consider likely to result in discharge of dredged materials, thus requiring a 404 permit.

On April 17, 2001, after reviewing the Clinton-era regulation, the Bush Administration announced its support of the new rule, allowing it to take effect immediately.

Humane Society Challenges President's Decision

Humane Society v. Clinton, 236 F.3d 1320 (Fed. Cir. 2001).

April Roberts, 3L

In January, the United States Court of Appeals for the Federal Circuit refused to order the President of the United States to impose sanctions on a foreign nation pursuant to the High Seas Driftnet Fisheries Enforcement Act¹ (Act). The court also found that the Act carries an implied waiver of sovereign immunity and that actions of the Secretary of Commerce in issuing a certification under the Act is subject to judicial review. The appeal filed by the Humane Society of the United States, the Humane Society International, and the Defenders of Wildlife, (Plaintiffs) stems from the judgment of the United States Court for International Trade denying the issuance of a writ of mandamus² directing the President of the United States (President) to impose sanctions as a form of punishment on Italy for its violations of the High Seas Driftnet Fisheries Enforcement Act. In addition, the appeal charges that the lower court erred in finding that actions by the Secretary of Commerce were not arbitrary and capricious.

High Seas Fisheries Enforcement Act

The use of large-scale high seas driftnets is an effective but highly controversial means of catching fish. Driftnets usually consist of miles of webbing deployed at night and allowed to float with the currents with the purpose of entangling fish. Because these nets are suspended in the water vertically by buoys and weights, they act as a large fence. This fence tends to entrap all marine life it comes into

contact with resulting in the drowning deaths of many air-breathing mammals, such as whales, dolphins, and sea turtles.

The United Nations sought to end the use of large-scale high seas driftnets by calling for a worldwide moratorium on their use, and Congress responded by passing the High Seas Driftnet Fisheries Enforcement Act in 1992. The Act establishes a method by which foreign states that use driftnets may be subject to sanctions, including denial of U.S. port privileges. Under the Act, the Secretary of Commerce identifies foreign countries that use large-scale driftnets. The President may

then enter into negotiations with the country to reach an agreement to terminate the illegal fishing methods. If

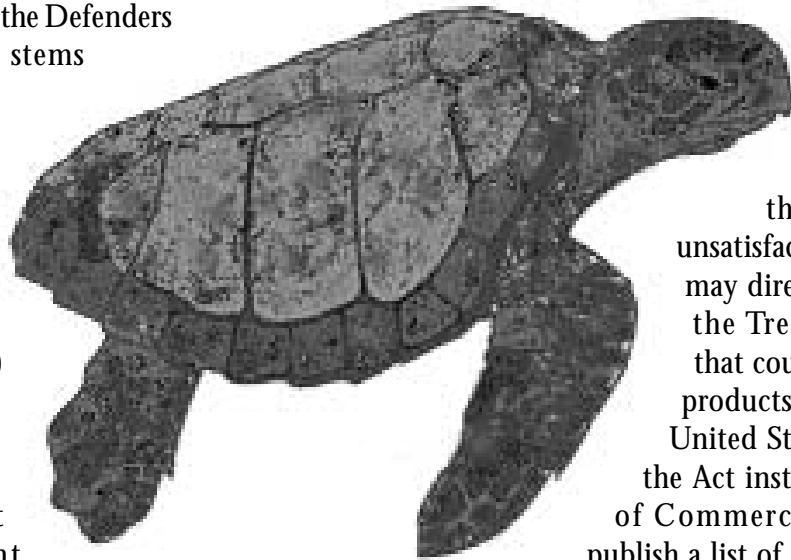
the negotiations are unsatisfactory, the President may direct the Secretary of the Treasury to prohibit that country's fish and fish products from entering the United States. Furthermore,

the Act instructs the Secretary of Commerce to periodically publish a list of the foreign nations identified as violating the Act and

instructs the Secretary of the Treasury to deny port privileges to those nations. The denial of port privileges is only lifted when the Secretary of Commerce certifies to both Congress and the President that the countries have ceased their illegal driftnet fishing.

Background

Plaintiffs filed their initial suit in 1995 alleging that the Secretary of Commerce had failed to identify Italy as a nation in violation of the Act. The plaintiffs alleged that Italian ships employed large-scale driftnet fishing on the high seas in violation of the



Act and the trial court agreed. Under the trial court's holding, the Secretary of Commerce was instructed to identify Italy as a possible violator and notify the Italian President accordingly. Pursuant to necessary procedures under the Act, the U.S. entered into negotiations with the Italian government and received proposals from the Italian government of its intention to discontinue the use of driftnets. These assurances were sufficient to avoid the imposition of sanctions and the Secretary of Commerce "certified" to the President that Italy was no longer involved in the process of illegal driftnet fishing.

The current case arose in 1998 when the plaintiffs filed a second suit against the President alleging that Italy was still engaging in the process of illegal driftnet fishing, despite the previous certification by the Secretary of Commerce. The plaintiffs asked the Court to require the Secretary to suspend the certificate of termination because of the alleged, on-going violations. The trial court denied the request holding that the President's determination of whether the negotiations with Italy had been "satisfactorily concluded" was within the discretion of the President. In addition, the trial court held that the Secretary's certification of termination was not arbitrary and capricious.³ The U.S., in turn, raised the defense of sovereign immunity, arguing that the trial court did not have jurisdiction in this case.

Decision of the Court of Appeals

The United States Court of Appeals for the Federal Circuit first held that the Act involved an implicit waiver of sovereign immunity and therefore, the trial court did indeed have jurisdiction over the case. Generally speaking, the United States government is immune to suits under the principle of sovereign immunity, which allows the government to continue to function in situations where unpopular, but necessary decisions must be made. Raising the defense of sovereign immunity, the government claimed that it could not be held liable under the Act and that the trial court lacked jurisdiction to determine the government's liability. The court did not agree, finding that the Act itself grants jurisdiction to the court of International Trade to hear specific cases under the Act and to determine the liability of the government officials for actions taken pursuant to the Act. The court also found that the President enjoys broad dis-

cretion in the determination of whether or not an agreement reached under the Act may be deemed a "satisfactory conclusion" of the negotiations with foreign nations.

The Court then turned to the Secretary's certification that Italy had ceased its illegal fishing. When focusing on the Secretary's action, the Court must determine whether the action was done in an arbitrary and capricious manner. This essentially requires that the court look into whether or not the Secretary made a decision based on reasonable inquiry into the situation at hand or merely acted at random. When certifying that a nation has terminated its illegal activities, the Secretary should look at the conduct and intentions of that nation's government. The court held that the evidence presented showed that even though the proposals presented by Italy were not fully implemented, they were adequate to give assurance that the nation intended to comply with the agreement. Hence, the court held that the Secretary's actions were not arbitrary and capricious.

Conclusion

In charges under the High Seas Fisheries Enforcement Act, the government may not raise the defense of sovereign immunity because the Act grants specific jurisdiction to the courts and carries an implied waiver of sovereign immunity. The court also held that the President has broad discretion in the decision of whether negotiations, with a foreign nation, have been "satisfactorily concluded." Finally, the court decided that a certification by the Secretary of Commerce may be reviewed by a court under the arbitrary and capricious standard. ✓

ENDNOTES:

1. High Seas Fisheries Enforcement Act, 16 U.S.C. § 1826 (Supp. IV 1998).
2. A writ of mandamus is a directive from a court of superior jurisdiction commanding a lower court or its officers to do something particular within its authority. Black's Law Dictionary, 961 (6th ed. 1990).
3. The trial court's complete holding included a ruling that the Secretary of Commerce acted arbitrarily and capriciously in its certification of Italy.

Pipeline, from page 1

Determining the Effects on Habitat

To meet the statutory requirements of planning the pipeline, Gulfstream conducted an Environmental Assessment (EA) to comply with the National Environmental Policy Act (NEPA). The EA described the scope and identified significant impacts on the environment. Because the EA found that the project will have significant effects on the environment, Gulfstream prepared an Environmental Impact Statement (EIS) to assess, among other items, the effects on Essential Fish Habitat (EFH) designated for federally-managed species in the Gulf.

EFH is defined as “those waters and substrate necessary for spawning, breeding, feeding, or growth to maturity”³ and actions having potential adverse effects on EFH require an impact analysis. In 1999, the Gulf of Mexico Regional Fishery Management Council and the National Marine Fisheries Service designated the majority of the Gulf of Mexico as EFH. Because the pipeline will traverse EFH, Gulfstream was required to conduct an EFH analysis to supply (1) a description of the action, (2) an identification of direct, indirect, and cumulative impacts, (3) the effects of the action on EFH, and (4) a proposal for mitigation of adverse effects. The analysis concluded that 25 of 27 species in the area will face some sort of adverse impact through the construction, operation, and maintenance of the pipeline. Gulfstream must also determine the adverse effects on areas containing prey species to determine the impairment placed on these species to act as food sources.

Pipeline Construction and its Impacts

To install the pipeline underwater, a remote operated sled will excavate a trench with high pressure air and water jets. In shallow water installation, divers will create trenches using hand-held jets. Finally, barges and other support vessels will install the pipeline while anchored above the excavation site.

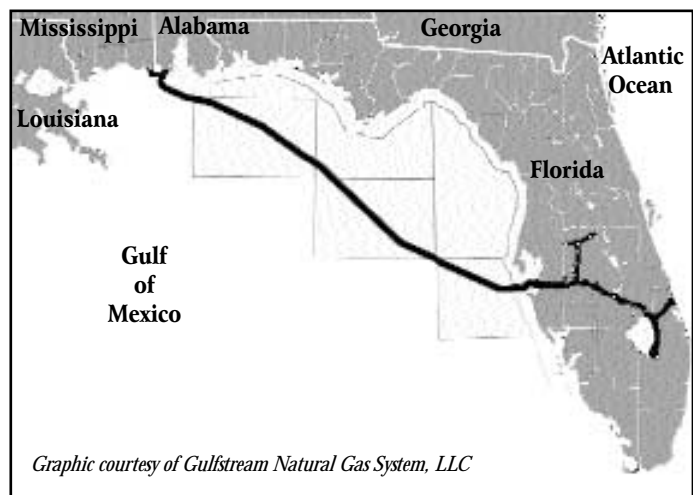
Excavation. The majority of impacts result from the excavation process required to install the pipeline. The first widespread impact originates from sedimentation and turbidity from the jetting process: an estimated 2886 acres of sea bottom will be affected.⁴ By increasing the suspended material in the water column, eggs and larva of demersal and pelagic fish species may face substantial mortality rates. Adult species may encounter less

adverse impact because projections assume they will avoid the construction area. Along with the effects on eggs and larva, the hard bottom and soft bottom communities will face impairment and destruction from the jetting process.

Installation. The second widespread impact occurs from the anchoring and cable sweeping related to the installation of the pipeline. Anchoring barges used to install the pipeline leave anchor scars on the sea floor which remain after an anchor is removed from the sea bottom. As a result, the hard bottom and soft bottom communities are destroyed or severely impaired from anchor placement. Each “anchor footprint” affects a 320 square foot area of bottom habitat that is essential to support reef fisheries. These “footprints” cumulatively affect 60 acres of bottom habitats.⁵

Furthermore, cable sweeps occur when cable attached to anchors drag across the sea bottom. These sweeps disturb and may destroy live fauna and breeding grounds for fish species. This impact is by far the greatest single impact on EFH. The estimated area affected is over 46,068 acres of hard bottom and 5,950 acres of live soft bottom habitat.⁶ The installation and excavation effects occur simultaneously.

Maintenance and Recovery. Gulfstream estimates 32 acres of live and hard bottom habitat impacts for the actual pipeline.⁷ The U.S. Department of Transportation and the Minerals Management Service require a pipeline in less than 200 feet of water to be covered by 3 feet of soil or bottom particulate. Periodic pipeline inspections must occur in these areas in order to monitor earthen cover of the pipeline. These inspections cause minimal adverse



effects on the habitat as compared with the other more wide spread impacts occurring from the excavation and installation process.

Gulfstream estimated the recovery periods to range from temporary impacts (day to weeks to recover) to permanent impacts (more than 20 years to recover). The sedimentation and turbidity is expected to be a temporary impairment but the anchoring and cable sweeping will likely cause permanent damage to the habitat's live fauna and substrate. The impacts to the hard and live bottoms habitats will also adversely affect prey species that act as food sources for federally managed fish species.

Mitigation of Effects on EFH

After reviewing the adverse effects from the EFH analysis, the FERC incorporated these considerations by making the approval of Gulfstream's certificates conditional upon mitigation. Generally, Gulfstream must avoid EFH wherever possible. To accomplish this, the FERC requires Gulfstream to follow very specific mitigation measures. For example, Gulfstream cannot conduct construction activities in the grouper marine reserve at Steamboat Lumps during the gag grouper spawning time (January through May).⁸

Furthermore, Gulfstream must develop and implement a plan to monitor hard bottom and live bottom impacts resulting from the construction process. The plan must be completed and approved prior to the beginning of construction activities. Developed in consultation with the Minerals Management Service and the National Marine Fisheries Service, the plan will provide monitoring of activities that include pipeline trench, anchor strike and cable sweep areas.

In order to limit the damage that occurs due to anchor strikes and cable sweeps, Gulfstream will use digital global positioning systems and geographically referenced digital maps of hard bottom areas to aid in the placement of anchors. The anchor placement must avoid hard bottom impact when possible. To aid in the monitoring study, Gulfstream will supply an "as built" anchor plat showing the location of all anchor strikes that impact the delineated hard bottom areas.⁹

Finally, Gulfstream has contributed at least \$350,000 in the Gulfstream Environmental and Recreational Trust Program to grant awards to pro-

jects demonstrating community and environmental need, especially for projects that are near the pipeline route. This program is scheduled to begin once the construction for the pipeline has commenced and continue for five years after operation has begun.¹⁰

Conclusion

The adverse effects caused by the construction and installation activities along the route of the pipeline pose substantial impacts to EFH and areas designated as unique marine reserve habitat. The FERC has determined that Gulfstream has made attempts to mitigate the impact of the pipeline on these areas in the Gulf but is requiring additional mitigation measures in order to insure that effects on the environment are minimal. This project demonstrates the responsibility placed upon proposed projects that may adversely affect EFH to establish plans and alternatives that will minimize that adverse effect. ♡

ENDNOTES:

1. Originally, Gulfstream was one of two competing pipeline proposals. Buccaneer Gas Pipeline Company ("Buccaneer") proposed the other. During the last few months, because of corporate mergers, The Williams Companies and Duke Energy Corporation acquired 100 percent membership interests in Gulfstream on February 8, 2001. With the purchase of Gulfstream, the company that was further along in the permitting process, the Buccaneer proposal was abandoned. The Buccaneer pipeline was likely to have greater adverse impacts on essential fish habitat and marine reserves in the Gulf.
2. FERC Order issuing Certificates. 94 FERC 61,185 (2001) at 12 (on file with editors).
3. 16 U.S.C. § 1802(10) (2001).
4. ERC Draft Environmental Impact Statement. FERC Docket No. CP00-06-000, pg. 5-7 (On file with editors).
5. *Id.*
6. *Id.*
7. *Id.*
8. See. 94 FERC 61,185 at 22.
9. *Id.*
10. For more information from Gulfstream, visit www.gulfstreamgas.williams.com. 🐼

The MASGLP Web Site is Sporting a New Look

The Mississippi-Alabama Sea Grant Legal Program has been on the World Wide Web since 1998. In January 2001, the web site was completely redesigned adding enhanced accessibility and many new features.

One notable addition is the “**Coastal News**” page, offering current news articles on topics that impact the coasts. The page includes an “archive” feature, allowing users to access articles from prior weeks and months. Another notable feature is the **Research and Publications** page, providing access to both current and past research projects and a variety of publications. Arranged by topic, the Research and Publications page is user-friendly and provides links to many relevant publications on marine law and policy, with just the click of the mouse.

One of the most popular features continues to be the availability of current and back issues of the

Water Log Legal Reporter for readers who want an on-line source for a variety of ocean and coastal legal issues. Coming soon to the web site is the **Fisheries Management** page offering a one-stop location for updates on federal fisheries management policy and law, including analysis of current fisheries statutes, case law and regulations.

The web site provides an **About Us** page with an introduction to the Mississippi- Alabama Sea Grant Legal Program staff and a description of our Sea Grant partners. As always the web site is a rich resource for links to other web sites that offer information on marine affairs and policy issues.

Please visit our new and improved web site at: www.olemiss.edu/orgs/masglp and give us your comments and suggestions for making the web site your first stop for ocean and coastal policy information. ♡

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is a continual
miracle."*
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Walt Whitman (1856)

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Lagniappe *(a little something extra)*

Around the Gulf . . .



The **Dauphin Island Sea Lab** has been named the nation's 13th Coastal America Coastal Ecosystem Learning Center. The prestigious federal designation celebrates the Sea Lab's premier coastal research, education and outreach programs and its valuable contribution in providing comprehensive marine environmental sciences support for Alabama and surrounding regions. The Coastal America partnership, established in 1992, brings with it pledges of long-term support from the Coastal America federal partners.

In late January, a female **leatherback turtle** made an unexpected appearance in a lagoon on Florida's coast. The mammoth turtle had flipper tags indicating she had been tagged by researchers in Costa Rica seven years earlier. Researchers and conservation groups used this sighting to emphasize the importance of international cooperation in sea turtle conservation. Leatherbacks are the largest of all sea turtles and are now considered critically endangered. The immense turtle was rescued by the U.S. Coast Guard and released unharmed in deep waters.

Alabama's oyster industry has endorsed a bill pending in the Alabama House aimed at curtailing **illegal oyster sales** and imposing tighter regulatory controls on oyster harvesting. The proposed bill would require oystermen to pick up a trip ticket before leaving the dock and to check back in with conservation officials upon their return. This measure comes as federal health officials are taking a closer look at the oyster industry in an effort to safeguard against cases of bacterial infections linked to eating raw oysters.



Around the Nation . . .



Archaeologists are surveying the **underwater wreckage** lying off the coast of Utah and Omaha beaches in France, in an attempt to find out what happened to the missing soldiers of the Normandy Invasion. Fifty-six years after the battle, researchers using sophisticated equipment have found, among other things, several Sherman tanks and more than two dozen shipwrecks lying in waters ranging from 5 to 30 meters deep. The team hopes that identifying some of the wrecks might provide closure to the relatives of servicemen still listed as MIA.

The Bush Administration will consider allowing drilling for oil and gas on "**all public lands**," including areas designated as national monuments. Reiterating his support for energy exploration in Alaska's Arctic National Wildlife Refuge, the President said he would not consider putting a drilling rig in the "crown jewels of our environment," but that there are some public lands that are suitable for exploration. ✓

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Upcoming Conferences

MAY, 2001

Communities Working for Wetlands

May 16-18, 2001, Orlando, FL

<http://www.iwla.org/SOS/awm/awmconf.html>

JUNE, 2001

Open Ocean Aquaculture IV: An International Symposium

June, 2001, New Brunswick, Canada

http://www-org.usm.edu/~ooa/ooa_iv/first__announcement.htm

JULY, 2001

7th International Interdisciplinary Conference on the Environment

July 2-4, 2001, San Francisco, CA

<http://www.assumption.edu/HTML/Academic/conf/IICEcall.html>

Coastal Zone '01

July 15-19, 2001, Cleveland, OH

<http://www.csc.noaa.gov/cz2001>

AUGUST, 2001

The Role of Water In History and Development

August 10 - 12, 2001, University of Bergen, Norway

<http://www.iwha.net>



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