Volume 25, Number 1
May, 2005

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Trio Convicted in Big Hill Acres Case

Long-Suffering Residents See Justice Done

Josh Clemons

The old cliché about selling swampland in Florida to unsuspecting purchasers is usually good for a chuckle, but it is no laughing matter when it happens for real. On February 25, real estate developer Robert J. Lucas, Jr., his daughter and real estate agent Robbie Lucas Wrigley, and professional engineer M.E. Thompson, Jr. learned how seriously the state and federal governments take the illegal destruction of wetlands, pollution of the public water supply, and defrauding of citizens when the U.S. District Court in Gulfport convicted them of forty-one federal charges relating to those crimes.

The Saga of Big Hill Acres[1]

The story begins in 1994, when developer Robert J. Lucas, Jr. started acquiring property in Vancleave, Mississippi, a small community northeast of Biloxi. Lucas eventually accumulated approximately 2,620 acres, half of which is wetlands that are hydrologically connected to the Gulf of Mexico. Lucas named the property Big Hill Acres. Big Hill Acres was marketed as mobile home lots ranging from two to five acres. Lucas' target demographic was low-income families, who could purchase lots on a high-interest installment plan. These lots were advertised as "high and dry."

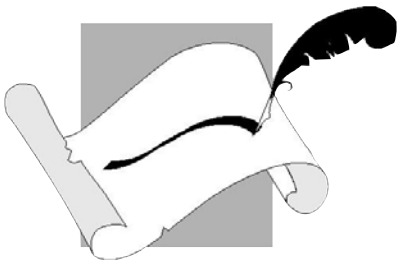
Lucas was notified in a 1995 engineer's report that the Big Hill Acres property included substantial areas of wetlands and flood zones. In 1996, inspectors from the U.S. Army Corps of Engineers (Corps), which has jurisdiction over the filling of wetlands under the Clean Water Act (CWA),[2] told Lucas that he could not develop the wetland property without a Corps permit. Later that year the Mississippi Department of Health (MDH) rescinded approval of septic systems at the development because the sites had not been properly evaluated. MDH re-evaluated the sites and discovered that more than half of the lots were on saturated soils, which do not allow for proper functioning of septic systems. The department also informed Lucas that on-site wastewater disposal systems must comply with state regulations, and that he was required by law to submit a subdivision plan that would allow the MDH to determine whether individual septic systems would be appropriate.

Around the same time, MDH found that some of the Big Hill Acres septic systems designed by professional engineer M.E. Thompson did not meet state requirements for operational effectiveness and informed him of the requirements. Thompson disregarded the advice and continued to install non-conforming septic systems in saturated ground near water wells at Big Hill Acres and elsewhere. MDH, alarmed at the potential for pollution of

See Big Hill Acres, page 6

In This Issue . . .

Court: Letters Provide Sufficient Notice of Claim



***Paradise Divers, Inc. v Upmal,* No. 04-12037 (11th Cir. Mar. 9, 2005)**

Danny Davis, 2L, University of Mississippi School of Law

According to the Eleventh Circuit, under the Limitation of Liability Act a vessel owner must file a petition for limitation of liability within six months of receiving a written notice about a claim, whether the claim is actual or potential.

Background

Kevin Upmal was first mate aboard the *M/V Paradise Diver IV*, a dive boat in the Florida Keys owned by Paradise Divers, Inc. (Paradise). Upmal was seriously injured while diving near Marathon, Florida in the course of his employment. Paradise refused to pay for Upmal's medical bills, so Upmal hired an attorney. Upmal's attorney wrote Paradise's attorney stating that Upmal intended to pursue claims for negligence, under the Jones Act, and for maintenance and cure under general maritime law. Some nine months after Upmal's attorney wrote to Paradise, Paradise's attorney filed a petition for limitation of liability under the Limitation of Liability Act in the U.S. District Court for the Southern District of Florida. The district court dismissed the petition as being untimely because the section of the Act in question, 46 App. U.S.C. § 185, requires filing a petition for limitation of liability within six months of notice of a claim being brought. Paradise appealed, stating that the letter from Upmal's attorney was not proper notice.

Liability

A vessel owner is responsible under general maritime law for providing maintenance and cure for a seaman who is injured or becomes sick during the course of employment. Maintenance includes wages and room and board, while cure provides for the medical cost of treating the seaman. Maintenance and cure are to be provided until the seaman has reached the best possible recovery. If a vessel owner fails to pay maintenance and cure, the seaman may bring a maritime suit against the vessel and have it arrested in order to secure payment.

Under the Jones Act, a seaman may also bring a maritime tort claim against the owner of the vessel alleging that the owner's negligence in some way caused the seaman's injury or sickness.[1] Prior to the Jones Act, a seaman was not allowed to bring a claim for damages where a negligent act of the owner or other seaman on the vessel caused the injury. A claim for maintenance and cure and a Jones Act claim must be brought in one case.

Limitation of Liability

In 1851, Congress enacted the Limitation of Liability Act (Act) to encourage American ship building. The purpose of the Act was to give American ship owners the same benefits as their foreign competitors. The Act allows a ship owner to limit the liability for which the vessel is liable to the value of the vessel.[2] In 1936, Congress amended § 185 of the Act by adding a time

See Paradise Divers, page 7

Sea Grant

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

To subscribe to WATER LOG free of charge, contact: Mississippi-Alabama Sea Grant Legal Program, 262 Kinard Hall, Wing E, P. O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: **waterlog@olemiss.edu** . We welcome suggestions for topics you would like to see covered in WATER LOG.

Editor: Josh Clemons, M.S., J.D.

Publication Design: Waurene Roberson

Contributors:
Danny Davis, 2L • Ginger Weston Easley, JD
Elizabeth Mills, 2L • Ronni F. Stuckey, 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/orgs/SGLC

Fifth Circuit Rules Gaming Vessel Conversion Non-Taxable

***Superior Boat Works, Inc. v. Miss. State Tax Commn.*, 122 Fed. Appx. 784, 2005 WL 361820 (5th Cir. Feb. 16, 2005)**

Ronni F. Stuckey, 2L, University of Mississippi School of Law

Superior Boat Works, Inc. (Superior) appealed a decision by the U.S. District Court of the Northern District of Mississippi that a transaction between Superior and Lady Luck Mississippi, Inc. (Lady Luck) to convert a vessel owned by Lady Luck into a floating casino was taxable. The U.S. Court of Appeals, Fifth Circuit, reversed the district court's ruling and reinstated the bankruptcy court's holding that the transaction was non-taxable.

Facts

Lady Luck contracted with Superior for the boat works to convert a barge into a floating gaming vessel. Lady Luck owned the barge at all times throughout the transaction. The converted vessel, named LADY LUCK I, was delivered to Lady Luck in Natchez by Superior after its conversion. Superior later filed for Chapter 11 bankruptcy.

The Mississippi State Tax Commission (MSTC) filed a claim stating that Superior owed taxes on the transaction under one of two theories. MSTC claimed that taxes were owed either under Mississippi Code § 27-65-17 for retail sales tax on the vessel or under Mississippi Code § 27-65-21 for contractor's sales tax on the conversion of the vessel.

The bankruptcy court ruled that Superior did not owe contractor's sales tax under § 27-65-21, stating that this tax provision did not apply to the transaction because the vessel was tangible personal property and remained so after its return to Lady Luck. The bankruptcy court also ruled that, though § 27-65-17 retail sales tax did apply to the vessel, the transaction was exempt from taxation under § 27-65-101(1)(c). Therefore the bankruptcy court ruled that Superior did not owe either tax.

MSTC appealed the bankruptcy decision to the district court, which reversed the bankruptcy court's decision that the vessel remained tangible personal property, finding that Superior was liable for the contractor's sales tax. The district court reasoned that because the contract between Lady Luck and Superior required delivery of a vessel that was a "permanently moored vessel," and because Superior moored the vessel to the bank of the Mississippi River, when the vessel was moored "it became an extension of the land."

. . .[t]he LADY LUCK I is not land; neither is an ownership interest in her an interest in land . . .

Analysis

The appeals court reviewed the district court's decision *de novo* (meaning the court considered previously-tried questions of fact as well as questions of law) and reversed the district court's decision with regard to the contractor's sales tax. The court stated that LADY LUCK I throughout the transaction maintained its identity as tangible personal property. In the court's words, "[t]he LADY LUCK I is not land; neither is an ownership interest in her an interest in land: The river flows between the LADY LUCK I and the bank; the gangways are the only means of ingress and egress to and from the bank; it rises and falls with the river; the utility lines, mooring lines, and anchors are easily detachable from the bank; it can be unhooked from the bank, moved elsewhere, and re-hooked without any damage to itself or the land."[1]

Outcome

The appeals court reinstated the bankruptcy court's decision, ruling that the vessel was personal property and thus not subject to contractor's sales tax. The court stated that, as personal property, the vessel was subject to the sales tax provision, but the transaction was exempt from sales tax under Mississippi Code Annotated §27-65-101(1)(c).

Endnotes

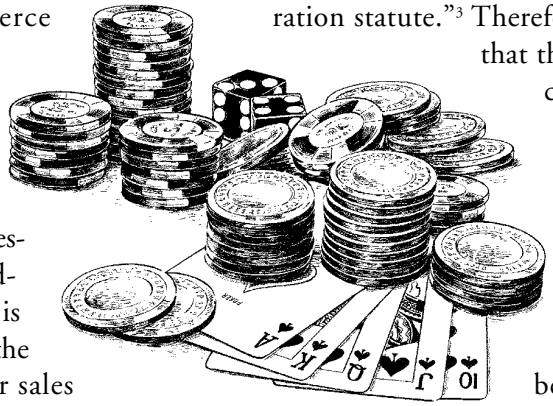
1. 122 Fed. Appx. at 787.

Florida Tax Constitutional, Applies to Gambling Cruises

***Fla. Dept. of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So.2d 954 (Fla. 2005)**

Elizabeth Mills, 2L, University of Mississippi School of Law

On February 17, 2005, the Supreme Court of Florida addressed whether "cruises-to-nowhere," which carry passengers three miles off the Florida coast in order to gamble, are able to take advantage of a prorated use tax which uses the ratio of intrastate to interstate or foreign travel to determine the taxation attributable to Florida. The Florida Supreme Court held that Florida's prorated use tax was applicable to gambling equipment on a cruise-to-nowhere because the ship was not exclusively used in intrastate commerce. Additionally, the court held that the application of the prorated use tax was not a violation of the Commerce Clause of the U. S. Constitution.



Background

New Sea Escape Cruises, Ltd. (New Sea Escape) is a Bahamian company operating as a foreign flag vessel. New Sea Escape's corporate headquarters are in Fort Lauderdale, and it is registered as a "Florida dealer" with the Department of Revenue (DOR) for sales and use tax purposes. In addition to cruises that only go a few miles off of the coast of Florida, New Sea Escape also travels to Freeport, Bahamas.

Florida has a use tax apportionment formula for vessels engaged in interstate or foreign commerce, and the tax statutes allow for an exemption for travel outside of Florida's territorial waters.[1] New Sea Escape was subject to a certain apportionment of Florida use taxes for proceeds associated with a gambling concession agreement, gambling equipment on the ship, and proceeds related to a concession agreement. New Sea Escape and the DOR had agreed that the ratio of mileage in Florida territorial waters to total mileage over a test period would be used to determine the percentage of the proceeds that were attributable to Florida, and this percentage would be used to calculate the amount of tax that was apportioned to Florida.

Since only forty of the 867.7 miles traveled during the test period were in Florida's territorial waters, New Sea Escape determined that the allocation to Florida was about 4.5 percent. However, at the DOR proceedings, the DOR held that the cruises-to-nowhere did not count as "transportation in foreign commerce," and therefore were not included in the exemption from Florida use tax. Because of the inclusion of the mileage for the cruises-to-nowhere, the DOR's allocation factor was 31.7 percent, and the DOR claimed that the total owed was $1,343,925.33 in taxes, penalties and interest for the September 1, 1996 to April 30, 1998 period.

New Sea Escape appealed the DOR's ruling to the state's Fourth District Court of Appeals.[2] The Fourth District stated that "[w]hen the vessel is cruising outside Florida's waters [three miles or more off the coast], those miles cannot constitute 'Florida mileage' under the proration statute."[3] Therefore, the Fourth District held that the DOR's determination that cruises-to-nowhere do not qualify as foreign commerce was incorrect. The Fourth District also held that the concessions were not taxable. The Florida Supreme Court granted review to settle the discrepancies between the Fourth District's decision in this case and a prior Fourth District decision in *Dream Boat, Inc. v. Dept. of Revenue*.[4]

Court's Analysis

The Florida Supreme Court first addressed the validity of the use tax and its application to New Sea Escape. New Sea Escape argued that the use tax was a violation of the Commerce Clause[5] because there was a risk of multiple taxation, and the tax kept the federal government from speaking with "one voice" in addressing commercial relations with foreign governments. Since New Sea Escape's gambling equipment was installed, stored, and maintained in Florida, the court held that the Florida use tax applied to New Sea Escape on a prorated basis. The court held that since there was no evidence that they were being double-taxed by Florida and

the Bahamas or evidence of the tax preventing the federal government from speaking with "one voice," there was not a Commerce Clause violation, and the prorated use tax was a valid way to ensure that Florida was getting its fair share of taxation for businesses that participate in interstate and foreign commerce and also do business in Florida.

Since the court held that the prorated use tax applied to New Sea Escape in general, the court next addressed the issue of whether the legislature intended the prorated use tax for vessels involved in interstate or foreign commerce to apply to cruises-to-nowhere. The court looked at the plain meaning of the pertinent statute which in part states that "[v]essels and parts thereof used exclusively in intrastate commerce do not qualify for the proration of tax."[6] Since "intrastate" is not defined by the statute, the court looked to the dictionary meaning and definitions in case law to determine what the plain and ordinary meaning of "intrastate" is and found that "intrastate" means "[c]ommerce that begins and ends entirely within the borders of a single state"[7] or "occurring within the state of Florida."[8]

The court also addressed the DOR's argument for not applying the prorated use tax to the cruises-to-nowhere. The DOR argued that cruises-to-nowhere are not foreign commerce, and therefore cannot use the prorated use tax. The DOR based its argument on *Dream Boat*, in which the Fourth District held that because cruises-to-nowhere do not leave the U.S. territorial waters, they cannot be considered to engage in foreign commerce. The Florida Supreme Court disagreed, noting that the proration provision of the Florida statute states that the allocation factor is allowed unless the party is solely participating in intrastate movement. Therefore the court held that "use" outside of Florida's borders is not "intrastate" in nature and is not subject to Florida taxation.

The court overturned *Dream Boat* and held that the interpretation under *Dream Boat* "contravenes the general principle of law that a state may not tax interests

See New Sea Escape, page 14

State, Official Not Liable for Failed Wetland Development Contract

***Dunston v. Miss. Dept. of Marine Resources,* 892 So.2d 837 (Miss. App. 2005)**

Ginger Weston Easley, J.D.

In January the Court of Appeals of Mississippi determined that the Mississippi Department of Marine Resources (DMR), a DMR permitting official, and the Commission on Marine Resources (CMR) were not liable to sellers of property for the failure of a prospective sale. The court found no evidence of conduct that would have penetrated the permitting official's sovereign immunity under the Mississippi Tort Claims Act,[1] held that the state and its officials were not "persons" under the federal civil rights statute, 42 U.S.C. § 1983, and found that an inverse condemnation claim was not ripe for judicial review.

Background

In the early 1970s Edward and Constance Dunston purchased approximately one hundred acres of land in Jackson County for $48,000. Portions of this property are wetlands. After selling several lots over the years, the Dunstons agreed to allow a potential buyer, the Oceana Design and Development Corporation (Oceana), to explore development options with a view toward purchasing the remaining eighty-five acres. Oceana had an option to buy this property from the Dunstons for $750,000.

The land is located on the Mississippi Gulf Coast, and part of it is in the Graveline Bay Coastal Preserve, an area designated as pristine coastal marsh that the state hopes to preserve. The Wetlands Protection Act of 1973 requires landowners to obtain a DMR permit prior to wetland development, and although some federal and state agencies responded favorably to Oceana's inquiries about the potential for future permitting, the head of the DMR's Office of Coastal Ecology, Stephen Oivanki, insisted that all of the property was wetlands and stated that "he would fight until the end to prevent any development" there. The Office of Coastal Ecology is involved in DMR's environmental permitting. Oceana declined to purchase the property.

The Dunstons filed suit against the state and Mr. Oivanki, alleging tortious interference with a contract and a business relation, claiming that they were treated differently than other property owners in violation of 42 U.S.C. § 1983, and asserting that DMR's actions

See Dunston, page 10

Big Hill Acres, from page 1

drinking water supplies by raw sewage, warned Thompson in March 1997 to stop installing septic systems without following the proper procedures to ensure that the systems would be effective. The department explained the regulations to Thompson and instructed him in the proper methods of testing soils to determine the feasibility of installing septic systems. Thompson continued to design and approve non-complying systems. In July 1997 MDH again ordered Thompson to comply with the law or stop designing and approving these septic systems. The MDH notified and/or warned Thompson of his deficiencies at least three more times in 1997, with no apparent effect.

In early 1998 Lucas began marketing Big Hill Acres through his daughter Robbie's real estate company. Lots were advertised as "2 Acres – High & Dry land, [with] well, septic & power pole." Throughout 1998 workers at Big Hill Acres who were building infrastructure advised Lucas that he needed a wetlands permit to legally excavate and fill the property. The Corps told him this as well, and threatened legal action if he did not cease and desist.

By summer 1999 the U.S. Environmental Protection Agency (EPA), which is charged with administering and enforcing the CWA, had gotten involved. In August the agency issued an administrative order warning Lucas that his ongoing construction work at Big Hill Acres was a violation of the CWA, and that if he did not stop he would be subject to civil or criminal penalties. Despite all the warnings, Lucas, his daughter, and Thompson continued their efforts to develop and sell the wetlands property known as Big Hill Acres.

The Charges

The grand jury indicted the defendants for the crimes of mail fraud; unpermitted trenching, draining, and filling of wetlands; and unpermitted discharge of sewage to wetlands, as well as for conspiracy to commit those crimes.

Eighteen counts of mail fraud were filed against the Lucases and Thompson. Fraud, in essence, is deceiving someone to induce them to act to their detriment (for example, to give up their money). The defendants' misrepresentations included: the Lucases telling potential buyers, in person and by advertisement, that Big Hill Acres lots were suitable for homes when they knew that the property contained saturated soils and was prone to flood; Thompson submitting approvals for septic systems to the county planning department when he knew that the systems did not meet state standards; the Lucases telling the county planning department that the septic systems met state standards, so that they could obtain electrical power for the lots; and the Lucases telling their customers that Big Hill Acres had adequate septic systems, when they knew that the systems were improperly designed and installed and likely to fail. Because payments for lots were transmitted by the U.S. Postal Service, these activities constituted the federal crime of mail fraud under 18 U.S.C. § 1341.

The CWA forbids the dredging and filling of wetlands without a permit issued by the Corps under authority of § 404 of the Act.[3] Ten counts of violating this law were filed against the Lucases and Thompson for putting fill material (including dirt, pipes, culverts, gravel, garbage, debris, cement, and asphalt) and septic systems in wetlands without a permit from the Corps. Finally, twelve counts of discharging pollutants (sewage and other wastewater) into wetlands without a permit, in violation of CWA § 402,[4] were filed.

The grand jury made additional findings of fact that were included in the indictment. Among these were: the defendants repeatedly caused discharges of fill material and sewage into wetlands; the resulting damage would be expensive to clean up; Thompson, a licensed professional engineer, abused the skills of his profession; Robbie Lucas Wrigley had a position of skill and trust as a real estate agent, which she abused; and at least 250 individuals were victimized by the defendants' fraud, at a cost to the victims of over $2.5 million.

On two occasions the defendants even added handwritten notes to the sales contracts, after the buyers had already signed, saying that the buyer had been given notice that his or her property contained wetlands. No such warnings had in fact been given.

The Outcome

Attorneys for the defendants argued that the Big Hill Acres wetlands were not protected by the CWA because they were not adjacent to navigable waterways, which is a requirement for federal protection. This argument was unsuccessful, and the defendants were convicted on all forty-one counts of the indictment. CWA violations carry a maximum of three years in prison per count; for mail fraud, the maximum is five years per count. The defendants will be sentenced on May 6 in Gulfport.

Endnotes

1. This information was assembled from the federal grand jury indictment and news reports from the Biloxi *Sun Herald* and Jackson (Mississippi) *Clarion-Ledger*. The district court did not issue a written opinion.
2. 33 U.S.C. § 1344.
3. *Id.*
4. *Id.* § 1342.

Paradise Divers, from page 2

limit in which a ship owner may file a petition for limitation of liability in federal court. Section 185 states that a vessel owner may petition a federal district court, with appropriate jurisdiction, for limitation of liability within six months of receiving written notice of a claim against the vessel. The owner is to deposit with that court a sum equal to the interest the owner has in the vessel.

The question before the Eleventh Circuit was whether or not the letters from Upmal's attorney were sufficient notice to start the running of the six month period. Paradise argued that the letters were ambiguous and there was no statement of an actual claim being brought against the vessel. The Eleventh Circuit agreed with the district court's decision that the letters were sufficient notice and that Paradise's petition for limitation of liability, filed nine months after the last letter, was untimely.

The court looked at how this issue had been handled in other circuits. The Second Circuit in *Doxsee Sea Clam Co. v. Brown* concluded that "notice is sufficient if it informs the vessel owner of an actual or potential claim…which may exceed the value of the vessel…and is subject to limitation."[3] The Seventh Circuit, in adopting *Doxsee* as the standard, added that "the written notice must reveal a 'reasonable possibility' that the claim made is one subject to limitation."[4] Following this line of reasoning, the Eleventh Circuit concluded that the two letters gave Paradise sufficient notice that Upmal was demanding payment for maintenance and cure and intended on bringing a Jones Act claim, all of which would be more than the value of the vessel.

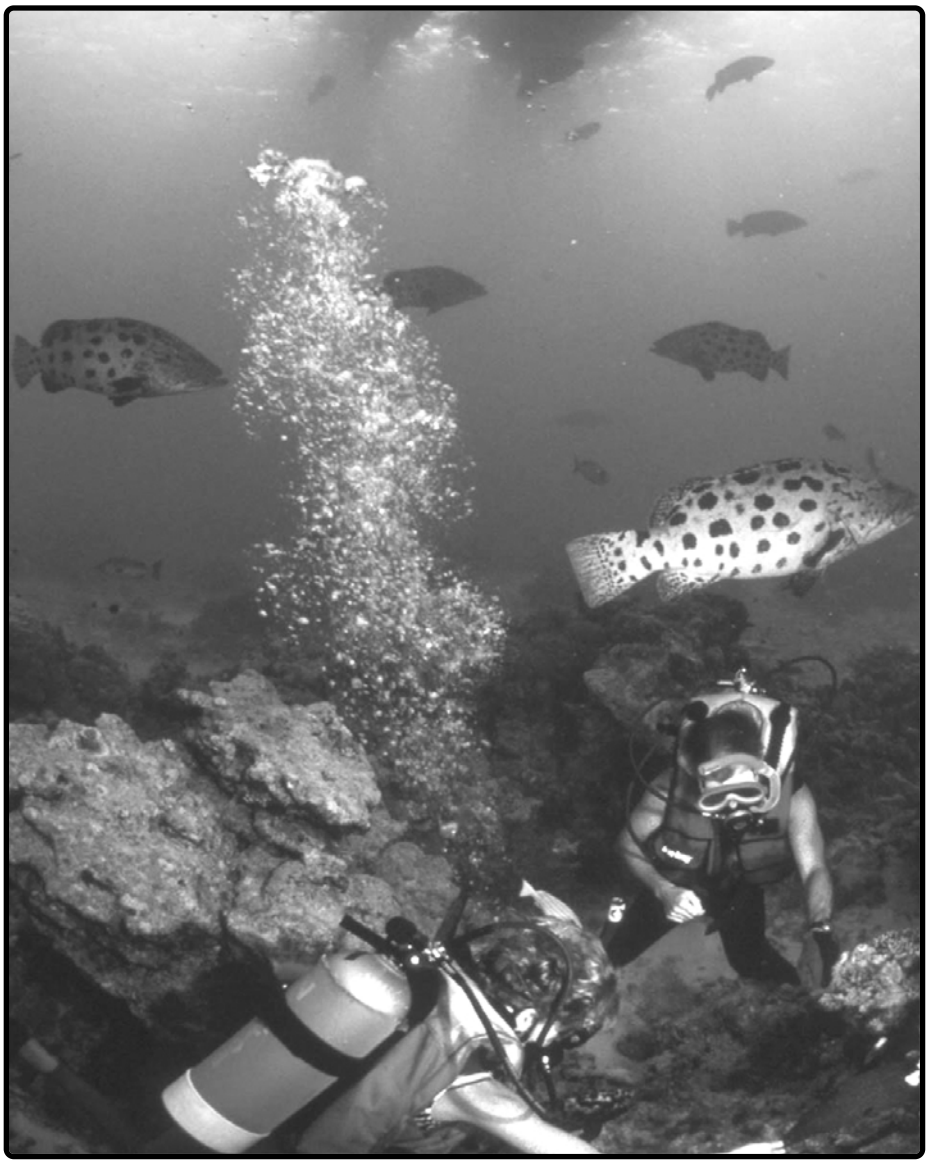
Conclusion

Since a vessel owner has only six months from the time of receiving written notice of a potential claim being brought against the vessel, it behooves the owner to file a petition for limitation of liability immediately whether or not a claim is ever brought.

Endnotes

1. 46 App. U.S.C. § 688.
2. *Id.* §§181-96.
3. 13 F.3d 550 (2d Cir. 1994).
4. *In re Complaint of Tom-Mac, Inc.,* 76 F.3d 678, 683 (7th Cir. 1996).

Photograph of divers from ©Nova Development Corp.



Florida Fishermen Lose Net Ban Challenge

***State v. Nichols*, 892 So.2d 1221 (Fla. Dist. App. 2005)**

Josh Clemons

The last issue of *Water Log* featured an article about a legal challenge mounted by two fishermen against rules established by the Florida Fish and Wildlife Commission to implement the state's ban of certain types of fishing nets.[1] The Court of Appeals of Florida, First District, had ruled against the fishermen, leaving the agency's rules in effect.

As that issue was going to press another group of fishermen was challenging the net ban statute. They asserted that a key term in the statute is ambiguous, and that the statute is therefore unconstitutionally vague and unenforceable. On February 15 the First District ruled against these fishermen as well.

Facts of the Case

On August 31, 2000, Officer Donald Craig Duval of the Florida Fish and Wildlife Commission arrested Bob and Damon Nichols for, among other things, violating the state's prohibition on fishing with gill or entangling nets made of monofilament material.

Through binoculars from a distance of approximately 150 yards Officer Duval had observed the Nichols fishing with a net that appeared to be entangling fish. After they had completed their fishing Officer Duval saw one of them making a hammering motion. He called for assistance, then pulled alongside the Nichols' boat and saw a hammer on the deck and what appeared to be a crudely fashioned hatch cover, partially obscured by carpet.

Once the boats were ashore Officer Duval boarded and inspected the Nichols' boat. On the deck he found a legal net, dry and matted, that "obviously had not been used."[2] He spied a piece of monofilament strand sticking out of the makeshift hatch cover, which had been nailed shut. Below deck was a gill or entangling net "laden with fish scales, spongy grass and other debris." The Nichols' boat also carried a large cooler containing 700-800 mullet that bore the distinctive marks of having been caught in a gill net.[3]

The Florida Net Ban

Florida's constitutional net ban amendment, enacted to protect fish stocks from "unnecessary killing, overfishing, and waste," makes it illegal to use any "gill nets or other entangling nets" in state waters.[4] By statute, "[a]ny net constructed wholly or partially of monofilament or multistrand monofilament material, other than a hand thrown cast net, or a handheld landing or dip net" is considered an entangling net.[5] The statute does not define the term "monofilament."

Photograph of salmon caught in gillnet courtesy of NOAA's National Marine Fisheries Service.

The Trial

The Nichols were tried in the County Court for Franklin County, a coastal county where fishing is a vital part of the local economy. The

jury found the Nichols guilty of unlawful use of a gill or entangling net made of monofilament, and guilty of possession of mullet in excess of the recreational bag limit while in possession of a gill or entangling net. After the verdicts were announced the Nichols submitted a motion for acquittal, arguing, among other things, that the statute that classifies monofilament nets as entangling nets is unconstitutional. The judge agreed to consider this motion, which advanced the theory that the terms "monofilament" and "multistrand monofilament" are too ambiguous to provide the public with clear notice of what conduct the statute prohibits.

The county court judge embraced the Nichols' constitutional argument, reasoning that "the term contradicting phrase that enhances the confusion. Criminal laws must be clear and leave no doubt as to their meaning. By prohibiting all nets made of 'monofilament' and 'multistrand monofilament' (excluding nets made of certain materials) without defining these terms, this statute is ambiguous and does not specify with clarity what conduct it purports to outlaw." The judge rejected the state's testimony that the meaning of "monofilament" is well known among fishermen, declaring that "*opinion* testimony by its nature cannot be sufficient to satisfy the constitutional requirement that a criminal statute be clear *on its face* and notice the public, without ambiguity, as to the conduct it seeks to prohibit."[6] Because it found "monofilament" and "multistrand monofilament" to be ambiguous terms, the court concluded that the statute is unconstitutional and could not be enforced. The judge vacated the Nichols' convictions. The state appealed to the First District Court of Appeals (DCA).

The Appeal

The Nichols' conviction for violating the mullet bag limit had already been reinstated by another court, so the only issue before the DCA was whether it should reverse the county court's ruling that the statute is unconstitutionally vague and reinstate the jury's conviction for unlawful use of a monofilament entangling net. The unlawful use charge had not involved the term "multistrand monofilament" so the court focused only on the term "monofilament" in its analysis.

The court recited the legal standard for declaring a statute unconstitutional because of vagueness: if the statute "fails to provide persons of ordinary intelligence fair notice of what conduct is forbidden, inviting arbitrary enforcement of the unwary." The legislature need not achieve "absolute linguistic precision," however, as long as "the statutory language conveys a sufficiently definite warning as to what conduct is proscribed." When a term is undefined in a statute, the term's common or ordinary meaning is the guide. Serious doubts about a statute's meaning are resolved in favor of the citizen.

At trial witnesses for both sides had testified to similar common definitions for "monofilament," including "fishing line," "plastic single strand material that is weaved together to make a net," "single strand like fishing line," and "a single strand of nylon." The court observed that Webster's Dictionary defines "monofilament" as "a single untwisted synthetic filament (as of nylon) made in varying diameters for use in textiles, hosiery, and screens or as bristles, fishing lines, and sutures." Applying the standard described above, the court concluded that the term "monofilament" has a "fixed and definite meaning" and "precisely describes something with which fishermen are familiar."

The Outcome

Because the term "monofilament" is not ambiguous, the Nichols had fair warning of what conduct was prohibited. The statute that defines any net made of monofilament material as an illegal entangling net is not unconstitutional and can be enforced. The county court's ruling that the statute is unconstitutional was reversed, and the conviction and fines imposed by the jury for unlawful use of a monofilament net were reinstated.

Endnotes

1. Josh Clemons, *Final Frustration for Florida Fishermen?*, Water Log 24:4, 8 (2005).
2. *State v. Nichols*, 892 So.2d 1221 (Fla. Dist. App. 2005). At the time of this writing the decision had not been paginated, so there are no pinpoint citations. Unless otherwise noted, all quotations are from this decision.
3. The recreational bag limit for black mullet in Florida is fifty-one fish, and the Nichols were charged with violating this limit as well.
4. Fla. Const. art. X, § 16.
5. Fla. Stat. § 370.093(2)(b).
6. Emphasis in original.

Dunston, from page 5

amounted to a taking for public use without due compensation under § 17 of the Mississippi Constitution. DMR obtained a grant of summary judgment in the Circuit Court of Harrison County, and the Dunstons appealed.

The Court of Appeals' Decision

The Dunstons did not prevail on any of their claims. The Court of Appeals rejected arguments that the permitting official intentionally made statements resulting in the buyer's refusal to purchase, in violation of the Mississippi Tort Claims Act, because the official exhibited none of the conduct that gives rise to liability under the Act: "fraud, malice, libel, slander, defamation or any criminal offense."[2] Further, the Dunstons failed to allege that they submitted an application to or were denied a permit by the DMR, and the court observed that even if DMR had denied a permit the agency would have been immune from suit for tortious interference with contract and business relations.

Photograph of wetlands plants from ©Nova Development Corp.

The federal civil rights statute provides a cause of action for a citizen whose constitutional rights have been violated by "any person" acting under the color of law.[3] The Dunstons alleged that Oivanki's comment to Oceana violated their constitutional rights by causing them to be treated differently than neighboring landowners who had developed their property. However, the U.S. Supreme Court has held that neither a state official acting in his official capacity nor a state agency is a "person" under the statute.[4] In this case the court determined that the Dunstons sued Oivanki in his official capacity as an employee of the CMR. DMR and CMR, state agencies, were the other defendants. The court rejected this claim because Oivanki, in his official capacity, and the agencies were not subject to suit under the civil rights statute.

Like the U.S. Constitution, the Mississippi Constitution prohibits the government from taking property from its citizens without compensation.[5] The Dunstons claimed that the state took their property without compensation by the following acts: "(1) inclusion of their property in the Graveline Bay Marshland reserve, (2) stonewalling any possible development to the property, (3) depositing dredge spoils, (4) placing a jetty on the property, and (4) [sic] the statements Oivanki made to [Oceana]."[6] However, the Dunstons had never actually been denied a permit to develop their land, because they had never applied for one. The Court of Appeals therefore refused to address the taking claim because it was unripe for review. To bring a justiciable takings claim the Dunstons must first be denied a permit; they must then bring their claim in the Circuit Court of Jackson County, where the property in question is located, and not in Harrison County, where this case originated.

Conclusion

The court of appeals affirmed the circuit court's ruling against the Dunstons on all their claims against the state and Mr. Oivanki.

Josh Clemons contributed to this article.

Endnotes

1. Miss. Code §§ 11-46-1 to -23.
2. *Id.* § 11-46-7(2).
3. 42 U.S.C. § 1983.
4. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989).
5. Miss. Const. § 17.
6. *Dunston v. Miss. Dept. of Marine Resources*, 892 So.2d 837, 843 (Miss. App. 2005).

EPA Makes Grants Available to States to Implement Water Quality Monitoring and Public Notification Programs at the Nation's Beaches

[Ed. note: the U.S. Environmental Protection Agency (EPA) has made grants available to coastal states for projects to improve water quality monitoring at beaches and inform the public of water quality problems. Reproduced below is the EPA Fact Sheet on this grant program, which was issued in March.]

We [EPA] are making $9.92 million in grants available to eligible states to protect public health at the Nation's beaches. These grants help coastal and Great Lakes states implement programs to monitor water quality at the beach and to notify the public when water quality problems exist.

What will these grants do?
State and local health and environmental protection agencies monitor the quality of water at the Nation's beaches. When bacteria levels in the water are too high, there is greater risk of people becoming sick. So when monitoring indicates bacteria levels are too high, these agencies post beach warnings or close the beach. State and local monitoring and notification programs differ across the country and provide different levels of protection for swimmers.

To make monitoring programs more consistent nationwide, improve water quality testing at the beach, and help beach managers better inform the public about water quality problems, Congress passed the Beaches Environmental Assessment and Coastal Health Act (BEACH Act) in October 2000. The Act authorizes us to award grants to help eligible states, tribes, and territories develop and implement beach water quality monitoring and notification programs. These grants also help them develop and implement programs to inform the public about the risk of exposure to disease-causing microorganisms in coastal waters (including the Great Lakes).

How much money is available?
In 2005, we expect to award about $9.92 million in grants that we will distribute to states and territories who apply based on the allocation formula we used in 2004. We consulted with various states and the Coastal States Organization in 2002 to develop this formula, which considers three factors: beach season length, beach miles (formula uses shoreline miles as a surrogate for beach miles), and beach use.

Based on this allocation formula, implementation grant awards range from $150,000 to $537,390, assuming that all 35 eligible states and territories apply. If fewer apply or qualify for the grants, then we will redistribute available funds to states according to the following principles:

- States that meet the program performance criteria will receive the full amount of funds for which they qualify under the allocation formula.
- States that do not meet the requirements for implementation grants may receive grants for continued program development. However, program development grants will be awarded only to complete the work needed to qualify for implementation grants.
- We may award program implementation grants to local governments in states that have not met the requirements for program implementation.
- We may use the grant allocation formula to make additional funds available for implementation grants to states that have met the performance criteria.

If all 35 eligible states and territories apply and meet the performance criteria, the distribution of funds for year 2005 will be [ed. note: to save space, only the gulf coastal states are listed here]: Alabama, $262,650; Mississippi, $257,810; Florida, $537,390; Louisiana, $326,780; Texas, $386,150.

We have set aside $50,000 for eligible tribes who may apply to develop a beach program. We expect to distribute these funds evenly among all eligible tribes that apply.

How long will the funding & project periods last?
One year.

Who can apply?
Eligible states, territories, and tribes having:

- coasts on the ocean or the Great Lakes and

See Beach Act Grants, page 14

Florida Municipalities Have Duty to Beachgoers

Rip Current Warnings a Must at Some Public Beaches

***Breaux v. City of Miami Beach*, Nos. SC02-1568, SC02-1569 (Fla. Mar. 24, 2005)**

Josh Clemons

In March the Florida Supreme Court reaffirmed that a municipality that operates a public swimming area has a duty to warn visitors of dangerous conditions, including rip currents. The court quashed a lower court ruling that the City of Miami had no such duty to warn two swimmers who had drowned in a rip current off a city-operated public beach.

Background

The facts giving rise to this case are tragic. On February 20, 1997 Eugenie Poleyeff, a tourist from New York, drowned in a rip current[1] at a Miami Beach beach. Ms. Poleyeff had rented a beach chair and umbrella from a business in front of the Seville Hotel that had permission from the hotel and a license from the City of Miami Beach to operate. Zachary Breaux, another tourist who was staying at the Seville, drowned in an attempt to rescue Ms. Poleyeff. The beach area had no lifeguards. The estates of Ms. Poleyeff and Mr. Breaux sued both the City of Miami Beach and the Seville Hotel for wrongful death, alleging that the city and the hotel breached the duty of care they owed to the decedents.

In this type of lawsuit the plaintiff must prove that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, (3) the plaintiff was injured, and (4) the injury was caused by the breach of the duty. All four of these elements must be present for the plaintiff to prevail.

The first element, duty of care, is often contested by the defendant and was the central issue in these cases. When a plaintiff sues the owner of the property upon which he or she was injured, a court must determine what duty, if any, the landowner owed to the plaintiff. The duty of care that a landowner owes to a person on his or her land may depend on several factors, including the status of the visitor with respect to the landowner (i.e., "invitee," "licensee," or trespasser) and the characteristics of the hazards on the land (e.g., hidden or obvious, known to landowner, created or controlled by landowner, etc.).

At beaches the boundary between private and public property is typically the high-water mark, as was the case here. Thus, the government owned the property below the high-water mark, where the deaths actually occurred. The hotel was merely the *adjacent* landowner. Adjacent landowners usually do not create the dangerous conditions on neighboring land, and have little or no control over them. They accordingly owe little or no duty of care to visitors on the neighboring land.

The Earlier Court Decisions

Considering the legal principles described above, it was unsurprising that the estates lost their case against the hotel. The trial court ruled in favor of the hotel and the plaintiffs appealed. In *Poleyeff v. Seville Beach Hotel Corp.*, the District Court of Appeal of Florida, Third District (DCA) affirmed the trial court's decision and declared that "an entity which does not control the [beach] area or undertake a particular responsibility to do so has no common law duty to warn, correct, or safeguard others from naturally occurring, even if hidden, dangers common to the waters in which they are found."[2] This holding, issued in February 2001, was squarely in keeping with Florida precedent.

The DCA's decision in the suit against the City of Miami Beach was a different story. As in the previous case, the trial court ruled against the plaintiffs, who appealed to the DCA. In June 2002 a three-judge panel of the DCA issued an unsigned, two-paragraph opinion in *Poleyeff v. City of Miami Beach* that merely restated the language quoted above from *Seville Beach Hotel* and affirmed the trial court.[3]

The lone dissenter in *City of Miami Beach*, Judge Cope, thoroughly explained why the court was mistaken to recycle the *Seville Beach Hotel* reasoning in *City of Miami Beach*. The crux of the issue is that the hotel and the City differ in one very important way: the hotel does not control the area where the drowning occurred, while the City does. It is this element of control over a piece of property that gives rise to a duty to warn of dangers on that property.

More importantly to Judge Cope's dissent, at least from a legal standpoint, was the fact that the majority's opinion conflicted with controlling precedent from the state's highest court. In its 2000 decision in *Fla. Dept. of*

Nat. Resources v. Garcia the Supreme Court of Florida noted that "a government entity operating a public swimming area [has] the duty to keep the premises in a reasonably safe condition and to warn the public of any dangerous conditions of which it knew or should have known."[4] The question presented in *Garcia* was whether the duty arose only if the government entity formally designated the area as a swimming area. The answer was no: the duty arose if, "based on all the circumstances, the government entity held the area out to the public as a swimming area or led the public to believe the area was a designated swimming area."[5] The court gave little guidance as to how this standard would be applied, but did observe that it requires more than "common use" of an area for swimming to give rise to the duty.[6]

The *City of Miami Beach* majority completely bypassed *Garcia*; the dissenting judge applied the *Garcia* standard to the facts of the case and determined that, based on all the circumstances, the beach where Ms. Poleyeff and Mr. Breaux drowned was indeed being held out by the City to the public as a public swimming area. He based this conclusion on the facts that the City provided facilities (showers, restrooms, drinking fountains, telephones, and parking) at the beach area; provided access to the beach from the boardwalk; was aware that beachgoers were using the area as a swimming area; and had established regulations for beachfront concessionaires like the umbrella rental stand.

The Florida Supreme Court's Decision

Because the DCA's decision in *City of Miami Beach* so plainly conflicted with *Garcia* it was almost inevitable that the plaintiffs would appeal to the Florida Supreme Court, who, unsurprisingly, reversed the decision. The high court considered essentially the same factors as Judge Cope (although with more emphasis on the fact that the City was deriving revenue from the beach area) and came to the same conclusion: under Florida law, the City was operating the beach as a public swimming area and owed beachgoers a duty to warn of dangerous conditions in the surf.

It is noteworthy that the court highlighted the fact that the City did much more than merely provide access to the water, which would not be enough City involvement to give rise to a duty of care. The state and local governments do not run the risk of being held liable every time someone drowns anywhere on Florida's state-owned coastline. The duty to warn of dangerous conditions applies only where, under all the circumstances, the government entity is holding out the beach as a public swimming area or leading the public to believe the area is designated swimming area.

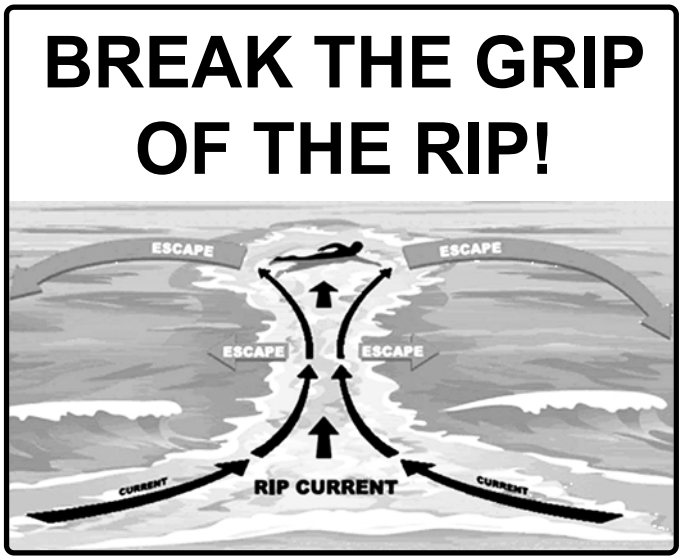
Conclusion

The court ruled that the City of Miami Beach owes a duty of care to foreseeable users of areas that it operates as public swimming areas to warn those users of dangers of which the City knows or should know. The court quashed the contrary decision from the DCA and remanded the case for a determination of whether the duty of care was breached in this instance.

Endnotes

1. Rip currents are dangerous surf phenomena described by the National Weather Service as "powerful, channeled currents of water flowing away from shore [that] typically extend from the shoreline, through the surf zone, and past the line of breaking waves. Rip currents can occur at any beach with breaking waves, including the Great Lakes" and are estimated to result in over one hundred drownings per year on U.S. beaches. For more information on rip currents and rip current safety, please visit <http://www.ripcurrents.noaa.gov/>.
2. 782 So.2d 422, 424 (Fla. Dist. App. 2001). Neither is there any such duty imposed by statute.
3. 818 So.2d 672 (Fla. Dist. App. 2002).
4. 753 So.2d 72, 75 (Fla. 2000) (citing *Avallone v. Bd. of County Commrs. of Citrus County*, 493 So.2d 1002 (Fla. 1986)).
5. *Id.* at 76.
6. *Id.*

Rip current illustration courtesy of NOAA.



New Sea Escape, from page 5

which are not within its territorial jurisdiction"[9] because it gives jurisdiction to Florida up to the twelve mile boundary from shore. The twelve mile boundary is used in certain contexts to delineate U.S. territorial waters for some federal statutes such as federal criminal jurisdiction but not for state jurisdiction. Therefore, there was no basis for the twelve mile boundary used in *Dream Boat* for the limits on intrastate commerce for cruises-to-nowhere, and the cruises-to-nowhere are properly considered foreign or interstate commerce. The court affirmed the Fourth District Court of Appeals' decision that the cruises-to-nowhere fall within foreign and interstate commerce, not intrastate commerce. The court also recognized that because New Sea Escape travels to the Bahamas as well, it should have been afforded the prorated tax regardless of the cruises-to-nowhere.

Conclusion

The court held that it was proper to apply the use tax to New Sea Escape because the ship's gambling machines were installed, stored, and maintained in Florida, but the court also held that the use tax should be prorated for the cruises-to-nowhere because the cruises do not occur solely in Florida's territorial waters, which extend three miles off of the coast. The court established that it was proper for Florida to assess use tax for activities associated with its jurisdiction, but it is beyond the jurisdiction of Florida to tax activities that occur beyond its territorial waters.

Endnotes

1. Fla. Stat. § 212.08(8)(a) (1997).
2. *New Sea Escape Cruises, Ltd. v. Fla. Dept. of Revenue*, 823 So.2d 161 (Fla. Dist. App. 2002).
3. *Fla. Dept. of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So.2d 954, 957 (Fla. 2005).
4. *Dream Boat, Inc. v. Dept. of Revenue*, No. 1D02-1253, 2003 WL 1560175 (Fla. Dist. App. Mar. 27, 2003).
5. The Commerce Clause of the U.S. Constitution, art. I, § 8, cl. 3, gives Congress exclusive authority to regulate interstate and foreign commerce.
6. Fla. Stat. § 212.08(8)(a) (1997).
7. *Fla. Dept. of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So.2d at 961.
8. *Id.*
9. *Id.* at 962.

Beach Act Grants, from page 11

- recreational waters next to beaches or similar points of access used by the public.

Tribes must also meet also meet the "treatment in the same manner as a state" criteria under CWA section 518(e).

"Coastal recreational waters" means areas where people swim, bathe, surf, or otherwise get in the water. See Clean Water Act Section 303(c) for details.

The July 2002 National Beach Guidance and Required Performance Criteria for Grants explains the requirements for states, tribes, and local governments to qualify for implementation grants.

Photograph of beach scene from ©Nova Development Corp.

The BEACH Act authorizes us to give a grant to a local government to implement a monitoring and notification program only when the state is not implementing a program that meets requirements within a year after we published performance criteria for beach programs. We published the criteria on July 19, 2002, so July 19, 2003, was the earliest a local government would have been eligible. To date, we believe that all states are implementing the program consistent with the requirements. Local governments should contact their EPA Regional Office for further information about BEACH Act grants.

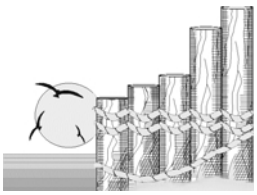
How does a state or territory apply?

Eligible states and territories may get an application from their regional grant coordinator.

For more information

For more information on the BEACH grants, please contact your regional grant coordinator or Rich Healy at 202-566-0405 (healy.richard@epa.gov). Also check the main beach grant page, <www.epa.gov/waterscience/beaches/>, for data requirements, the official federal register notice, and application forms.

Lagniappe *(a little something extra)*



Around the Gulf...

In March, members of the Mississippi National Guard serving in Iraq were treated to **a half-ton of delicious Gulf shrimp** courtesy of U.S. Rep. Gene Taylor (D-Bay St. Louis). Rep. Taylor, a member of the House Armed Services Committee and co-chair of the House National Guard and Reserve Components Caucus, was on a four-day trip to visit troops in Iraq, Kuwait, and Germany. With the help of R.A. Lesso Seafood, Northwest Airlines, the Transportation Security Administration, and the National Guard, Rep. Taylor was able to transport the tasty crustaceans from Mississippi to Washington to Iraq for the enjoyment of our men and women in uniform.

The Mississippi legislature has designated the **Pascagoula River** as eligible for the state's Scenic Streams Stewardship Program. The voluntary, non-regulatory program encourages the protection of streams that possess unique or outstanding scenic, recreational, geological, botanical, fish, wildlife, historic, and/or cultural values. In addition to possessing many of these outstanding values, the Pascagoula River is also the longest free-flowing river in the continental U.S. Under the program owners of non-industrial, private land adjacent to and alongside designated streams can donate conservation easements to the Mississippi Department of Wildlife, Fisheries and Parks. In return for these easements, which limit development of the land, donors receive income tax credits. (For more information on conservation easements, please see *A Citizen's Guide to Conservation Easements in Alabama & Mississippi*, available at <http://www.olemiss.edu/orgs/SGLC/citizen.pdf>.) The legislation was sponsored by Sen. Debbie Dawkins (D- Pass Christian) and Rep. Billy Broomfield (D-Moss Point), easily passed through both chambers, and was signed into law by Gov. Haley Barbour on March 15.

Community liaison officer for the Louisiana attorney general and longtime environmental justice advocate **Willie Fontenot** was pressured into early retirement after a March incident at the ExxonMobil refinery in Baton Rouge. Fontenot was leading a group of students from Antioch New England Graduate School, who were studying environmental racism and justice issues, on a tour of various locations in southern Louisiana. A few of the students were taking pictures of the refinery from the public sidewalk when off-duty police officers and sheriff's deputies working as ExxonMobil security guards pulled up and demanded that Fontenot collect and hand over the students' identification. Fontenot refused. The security guards threatened to call the Department of Homeland Security and detained the students for about an hour before allowing them to go on their way. The sheriff's department complained to the attorney general's office about Fontenot's refusal to assist the guards, and the following day Fontenot, who had worked in his position for twenty-seven years, was given the option of retiring or being fired.

In the Nation's Capital...

The Senate has confirmed **Stephen Johnson as Administrator of the U.S. Environmental Protection Agency (EPA).** Johnson had been Acting Administrator since January, when his predecessor Mike Leavitt was tapped by President Bush to serve as Secretary of the U.S. Department of Health and Human Services. A scientist and EPA lifer who was generally considered to be a non-controversial choice for the post, Johnson faced no real opposition in the Senate. However, the vote on his confirmation had been stalled by Sen. Tom Carper (D-Del.), who was protesting the Bush administration's failure to authorize studies of the relative effectiveness of the so-called "Clear Skies" legislation and its alternatives.

In April several **senators from Gulf states** were named to subcommittees of the Senate Commerce, Science and Transportation Committee. The Subcommittee on Fisheries and the Coast Guard will include Sens. Trent Lott (R-MS) and David Vitter (R-LA). The National Ocean Policy Study will include Sens. Lott, Vitter, and Kay Bailey Hutchison (R-TX).

Francis Hodsoll has been appointed **Deputy Director of the U.S. Department of the Interior's Minerals Management Service.** Hodsoll will assist in administration of the nation's outer continental shelf mineral resources, which include oil and natural gas. Hodsoll previously worked as a senior policy advisor for the U.S. Department of Energy.

WATER LOG (ISSN 1097-0649) is supported by the National Sea Grant College Program of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration under NOAA Grant Number NA16RG2258, the Mississippi-Alabama Sea Grant Consortium, State of Mississippi, Mississippi Law Research Institute, and University of Mississippi Law Center. The views expressed herein do not necessarily reflect the views of any of those organizations. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. Graphics and/or photographs by ©Corel Gallery, © Nova Development Corp., and NOAA.

MASGP-05-017-01 *This publication is printed on recycled paper.*
May, 2005

... Upcoming Conferences ...

•JUNE 2005 •

Oceans, 2005
June 20-23, 2005, Brest, France
http://www.oceans05europe.org/

Water Treatment and Distribution in Alberta
June 22-23, 2005, Calgary, Alberta, Canada
http://www.canadianinstitute.com/contentframes.cfm?ID=3157

•JULY 2005 •

28th Annual FAWQC Conference: Wind, Waves, Water
July 15-18, Naples, FL
http://www.fawqc.com

Coastal Zone '05: Balancing on the Edge
July 18-21, New Orleans, LA
http://www.csc.noaa.gov/cz/

The Role of Marine Organic Carbon and Calcite Fluxes in Driving–Global Climate Change, Past and Future
July 24-27, 2005, Woods Hole, MA
http://www.agu.org/meetings/cc05fcall.html

Soil and Water Conservation Society's 2005 Annual Conference
July 30, 2005, Rochester, NY
http://www.swcs.org/t_what_callforpapers05.htm

WATER LOG
Mississippi-Alabama Sea Grant Legal Program
Kinard Hall, Wing E, Room 262
P.O. Box 1848
University, MS 38677-1848

University, MS 38677

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