2-2006

Florida Court Limits Rule to Red Grouper

Jonathan Lew
Roger Williams University School of Law

Volume 25, Number 4
February, 2006

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Federal Court Holds Wetlands Mitigation Not a Taking

***Norman v. U.S.*, 429 F.3d 1081 (Fed. Cir. 2005)**

Gerald Woodward, 3L, Stetson University College of Law

The U.S. Court of Appeals, Federal Circuit has upheld a federal claims court ruling that the actions of the U.S. Army Corps of Engineers in conditioning the grant of a permit to impact wetlands on a Corps-approved mitigation plan was not an unconstitutional taking of the landowner's property without compensation. The mitigation plan provided for the creation or restoration of other wetlands on the same site as those that could be filled under the permit. Approval of the permit had been sought, and this appeal subsequently commenced, by the developers of a 2,280-acre property in Reno, Nevada.

Background

In 1986 the Southmark Corporation purchased a 2,425-acre property in Reno, Nevada called the Double Diamond Ranch. Southmark intended to develop the property as commercial and industrial office space. Toward that end it prepared a master development plan and submitted it to the Reno City Council for approval.

In early 1987 the city council gave preliminary approval to the plan and specified a number of conditions for a grant of final approval. One of these was the requirement for a wetlands delineation approved by the U.S. Army Corps of Engineers.

The following year, Don Roger Norman and Roger William Norman entered into an agreement with Southmark to purchase a 470-acre portion of the former Double Diamond Ranch property. The Normans intended to develop the tract for commercial use in accordance with Southmark's master plan. At about the same time another buyer, Robert Helms, purchased nearly all of the balance of the former ranch property from Southmark.

In September of 1988 the Corps issued a wetlands delineation for the property now substantially owned by Helms and the Normans. It identified a total of twenty-eight acres of jurisdictional wetlands on the property. However, the Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service, environmental groups and the general public uniformly criticized the delineation as inadequate. The Corps subsequently revoked it and in 1991 issued a new delineation developed under revised criteria. The new delineation identified a total of 230 acres of jurisdictional wetlands.

Three years later Helms went bankrupt and the Normans purchased his 1,800 acres from the bankruptcy estate. The Normans then developed a new three-phase master plan that included commercial and residential development. They applied to the Corps for a permit under section 404 of the Clean Water Act to

See Wetlands Mitigation, page 8

In This Issue . . .

Florida Court Limits Rule to Red Grouper

***Coastal Conservation Assn. v. Gutierrez,* 2005 WL 2850325 (M.D. Fla. 2005)**

Jonathan Lew, 2L, Roger Williams University School of Law

Introduction

The Coastal Conservation Association (CCA) and the Fishing Rights Alliance (FRA), groups representing the recreational fishing industry, challenged an interim rule published by the Secretary of the U.S. Department of Commerce (Secretary) in conjunction with the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS, also known as NOAA Fisheries). In consolidated civil actions the plaintiffs sought declaratory relief, alleging that the defendants' interim rule was arbitrary and capricious.[1] The industry groups alleged that there was no finding that red grouper was overfished, that the interim rule was overbroad because there was no determination that sixteen of the seventeen grouper species were overfished, that the interim rule was not based on the best scientific evidence available, and that the agencies' environmental assessment was inadequate.

Interim Rule

Pursuant to the Magnuson-Stevens Act, the Gulf of Mexico Fishery Management Council[2] develops fishery management plans. NMFS oversees the Council and makes the appropriate recommendations to the Secretary, who then promulgates the regulations to implement the approved plan. Once the plan has been approved and implemented it has the force and effect of law. If the Council fails to act in a timely fashion, the Secretary is required to prepare a plan, amendment, or proposed regulation. The Secretary can promulgate short-term interim rules to address emergency situations.

The stated purpose of the interim rule was to "reduce the likelihood that overfishing for red grouper will occur in 2005."

The Gulf of Mexico Fishery Management Plan for Reef Fish Resources was implemented in November 1984. In October 2000 NMFS determined that red grouper stock was overfished and undergoing overfishing.[3] This determination was based on stock assessment findings of red grouper stock as of 1997. Under the Magnuson-Stevens Act, the Gulf of Mexico Fishery Management Council had one year to submit a plan to end overfishing. The Gulf Council missed the deadline so the Secretary submitted a proposed Secretarial Amendment 1 to the Reef Fish Fishery Management Plan. Secretarial Amendment 1 imposed bag limits for recreational anglers, set a total allowable catch, and established a ten-year rebuilding plan for red grouper.

A subsequent assessment in 2002 found that even though red grouper stock was improving and could no longer be considered overfished, the "red grouper was not yet at the biomass level capable of producing maximum sustainable yield on a continuing basis."[4] On

See Red Grouper, page 4

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:
Tara Hartman, 2L • Alina Johns, 3L
Jonathan Lew, 2L • Emily Plett-Miyake, 3L
Benjamin N. Spruill, 3L • Gerald Woodward, 3L

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

Alabama Court Allows Taxpayer to Challenge Ruling

***Ex Parte Chemical Waste Management*, 2005 WL 3083492 (Ala. Nov. 18, 2005)**

Benjamin N. Spruill, 3L, Roger Williams University School of Law

In 2005, the Supreme Court of Alabama upheld a taxpayer's challenge to a revenue ruling issued by Alabama's Department of Revenue. The revenue ruling reassessed the tax structure and fees a landfill operator was required to pay for disposal of certain hazardous and non-hazardous waste.

Background

Operators of hazardous waste treatment, storage, and disposal facilities are assessed fees for waste received for disposal. Chemical Waste Management (ChemWaste), an operator of a facility, was levied $51 per ton for hazardous materials and $21 per ton for non-hazardous materials pursuant to Alabama Code § 22-30B-2(c)(1). The statute is enforced by the Alabama Department of Revenue (Department).

ChemWaste petitioned the Department to reassess the fee structure because some of the hazardous material ChemWaste received was treated at the facility and rendered non-hazardous. ChemWaste sought a revenue ruling that would decrease the fees imposed on this reclassified "decharacterized" waste to $21 per ton, instead of $51 per ton.[1] The Department agreed on this fee reduction and used the non-hazardous tax rate for the decharacterized waste. An Alabama taxpayer, John Nichols, challenged the Department's fee reduction and sought a declaration by the Montgomery Circuit Court that the reduction was a wrongfully granted tax abatement and should be declared void.

Legal Standing

A plaintiff can assert a claim only when he or she has a "real, tangible, legal interest in the subject matter of the lawsuit,…the party has been injured in fact, and…the injury is to a legally protected right."[2] Similarly, *taxpayer* standing requires that a taxpayer "can demonstrate a probable increase in his tax burden from the challenged activity" in order to challenge a tax abatement given to another.[3]

Nichols asserted a claim in the circuit court alleging that the Department's revenue ruling violated Alabama Code § 22-30B-2(c)(1), which sets fees for the disposal of hazardous waste. ChemWaste's motion to dismiss the charge was denied by the circuit court. ChemWaste then petitioned the Supreme Court of Alabama to review the lower court's denial of the motion to dismiss and determine whether Nichols had standing to bring a claim.

The court agreed with the lower court and found that Nichols satisfied the elements of standing. First, the court determined that Nichols was challenging an unlawful tax abatement, not charging that the Department has failed to carry out its collection duties. Under Alabama law a taxpayer has standing to challenge a tax abatement if the taxpayer can prove that his taxes will likely increase as a result of the abatement. However, a taxpayer does not have standing to force the state to collect taxes owed by a third party.

Next, the court determined that Nichols' complaint satisfied the burden of proving an increase in his taxes. The following language in the complaint was sufficient to prove the likelihood of injury: "[a]s a tax-

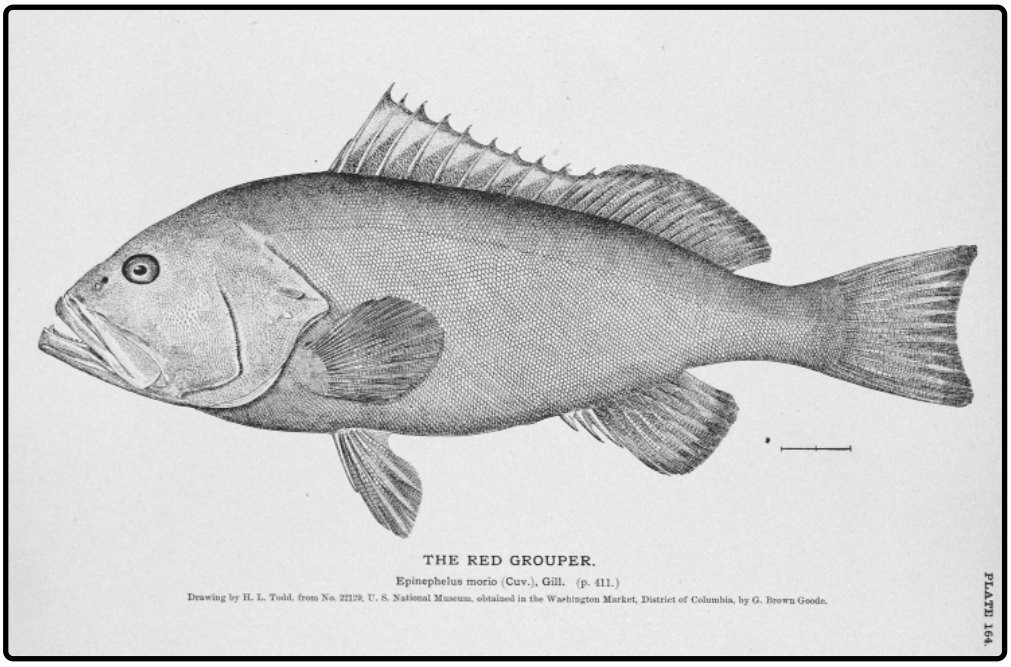
See Chemical Waste, page 11

Photograph courtesy of ©Nova Development Corp.

Red Grouper, from page 2

June 15, 2004, NMFS published its final rule to implement Secretarial Amendment 1.

In March of 2005, the Gulf Council found that red grouper landings "were likely to exceed recreational target level" as they had in the previous two years.[5] The Council passed a motion granting NMFS the authority to make an interim rule "to bring the recreational red grouper fishing within the target levels in Secretarial Amendment 1 for the year 2005."[6] The stated purpose of the interim rule was to "reduce the likelihood that overfishing for red grouper will occur in 2005."[7] NMFS published its interim rule in the Federal Register on July 25, 2005.[8] The interim rule reduced the red grouper bag limit from two fish per person per day to one fish per person per day, and reduced the aggregate grouper bag limit from five fish per person to three fish per person and closed recreational fishing for all grouper species in the Gulf of Mexico (Exclusive Economic Zone) for November and December 2005.



Photograph courtesy of NOAA's Historic National Marine Fisheries Service Collection

Finding of Red Grouper Overfishing

The plaintiffs first challenged the enactment of the interim rule, alleging that the defendants had made no finding of overfishing. The court looked to the Administrative Record that summarized the background of the interim rule and held in favor of NMFS. The court found that the Federal Register publication of the interim rule adequately established that the Secretary made the required finding of overfishing. Even though the 2002 stock assessment found that red grouper was no longer overfished, the Federal Register noted that the "Gulf Council had concluded that a reduction in recreational red grouper landings '[was] needed to end overfishing in 2005.'"[9] It further stated that NMFS and the Assistant Administrator for Fisheries had determined that the temporary rule was necessary to reduce overfishing of red grouper in the Gulf of Mexico. The findings were sufficient for the Secretary to conclude that red grouper was being overfished and an interim rule should be promulgated.

Interim Rule Overbroad

NMFS declared that a secondary purpose of the interim rule was "to evaluate and control the impact of the red grouper rebuilding plan on other species."[10] The industry groups sought a declaratory judgment that the defendants violated the Magnuson-Stevens Act and the Administrative Procedure Act (APA) because the interim rule was too broad; it limited fishing within *all* grouper species when the interim rule was only intended to reduce overfishing of *one* species. The Administrative Record only addressed the overfishing of red grouper, and the court noted that the "limitation and closure as to other grouper species [went] beyond the request made by the Gulf Council to promulgate an interim measure to bring the catch levels of red grouper into line with the Secretarial Amendment 1 requirements."[11]The court found that red grouper had consistently been treated as a distinct stock of fish, and without findings of overfishing as to other grouper species the extension of the interim rule could not be upheld.

Best Scientific Evidence

The plaintiffs claimed that the interim rule was invalid because the defendants did not use the best scientific evidence available. The Magnuson-Stevens Act requires conservation and management measures to be based upon the best scientific information available although

See Red Grouper, page 10

Conservation Group Finds Itself Up FERC's River Without a Paddle

***National Comm. for the New River, Inc. v. Federal Energy Reg. Commn.*, 2005 WL 3440696 (D.C. Cir. Dec. 16, 2005)**

Emily Plett-Miyake, 3L, Vermont Law School

The National Committee for the New River, Inc. (NCNR), an environmental group, petitioned for review of the Federal Energy Regulatory Commission's (FERC's) rejection of seven of its claims that a natural gas company had failed to comply with conditions imposed on a pipeline construction project. The Court of Appeals for the D.C. Circuit dismissed NCNR's petition, stating that the group lacked standing to challenge the company's conduct.

Background

In 2001, the East Tennessee Natural Gas Company (East Tennessee) petitioned FERC for permission to extend its natural gas pipeline, based in Tennessee, by about ninety-four miles, from Virginia to North Carolina. In 2002, FERC issued East Tennessee a certificate of public convenience and necessity for the proposed extension, known as the "Patriot Project." The certificate was subject to sixty-nine conditions, pursuant to Section 7 of the Natural Gas Act.[1] The conditions involved a wide range of issues relating to the pipeline's construction, including minimization of project impacts on the southern population of the bog turtle, ten-day deadlines for cleanup after trenches are backfilled, the filing of certain documents, including weekly status reports, with FERC, and terms by which changes to the project proposal would be allowed.

NCNR is an environmental group devoted to protecting the New River, which is located in North Carolina and southwest Virginia. NCNR has been involved in fighting the "Patriot Project" proposal since the initial certification proceedings, including participation as an intervenor in a losing challenge. NCNR continued to mount legal challenges against East Tennessee, and as of the time of this appeal had filed nearly twenty adversarial pleadings since the certification of the project. The particular pleading before the court here addressed seven of the FERC orders involving five of the legal issues arising from those pleadings. The appeal of the orders claimed that East Tennessee failed to live up to the conditions of certification.

Court Decision

The court discussed each of the appeals of the seven FERC orders in turn. NCNR's primary claim, and the subject of four of the orders and two rehearings, was that East Tennessee's route realignments were unauthorized because they varied too far from the original route that FERC had certified.

The court declined to evaluate these claims on their merits because it found that NCNR lacked standing to bring the challenge. In making this determination the court noted that "[a]esthetic and environmental harms may confer Article III standing if they describe a concrete and particularized injury in fact that is actual or imminent, causally linked to the conduct at issue, and redressable by the relief requested."[2] The court found that the harms alleged by the plaintiffs did not meet this standard. The court noted that the allegations were not sufficient and focused "on the general harms that would arise" as a result of construction.[3] The court said that "NCNR must demonstrate that its members have suffered, or will suffer, specific environmental and aesthetic harms as a result of the route realignments themselves."[4] The court found that the affidavits submitted by NCNR did not explain such a particularized injury. NCNR raised similar issues and showings of proof in challenges to the initial certification. The court

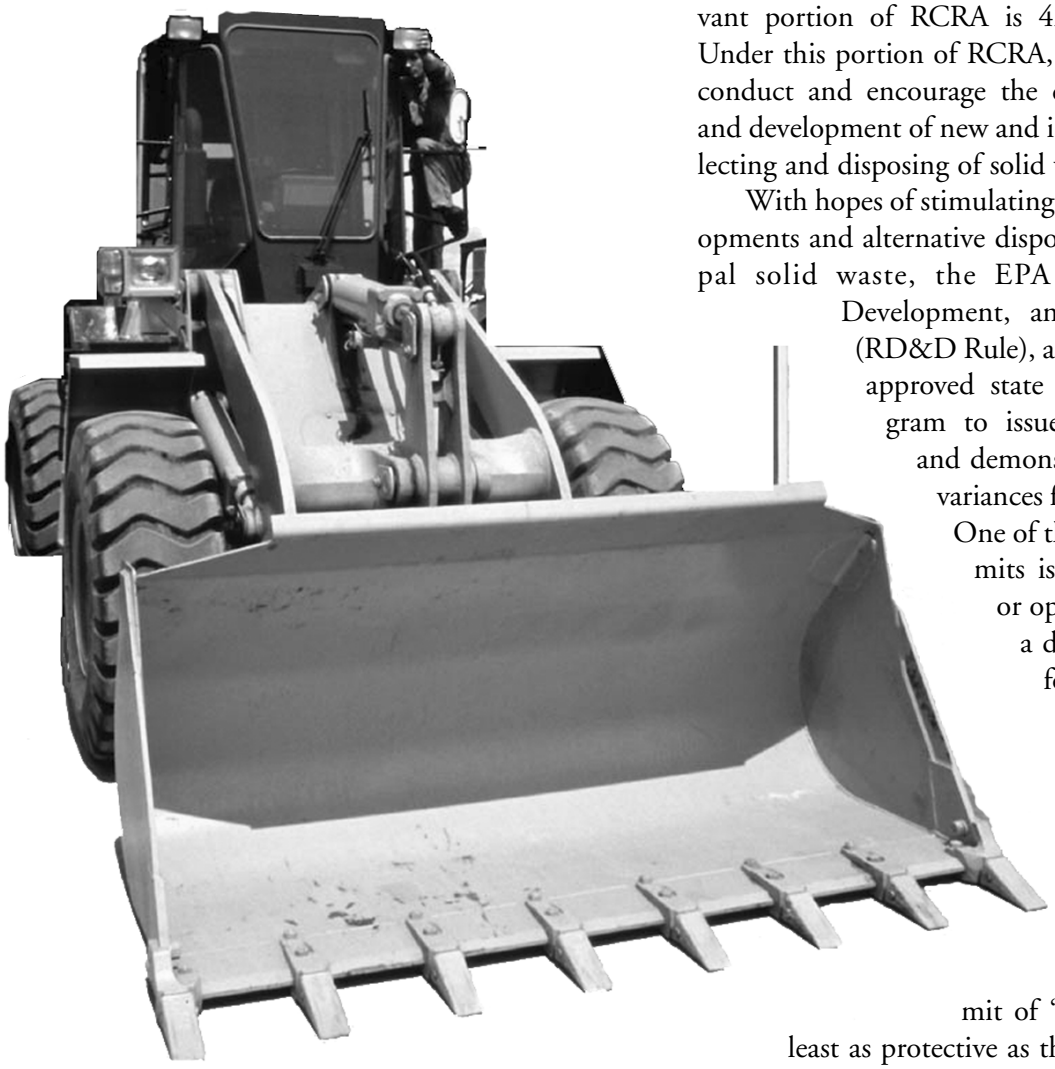
See FERC, page 13

D.C. Circuit Dumps Dump Case

***GrassRoots Recycling Network, Inc. v. U.S. Envtl. Protection Agency*, 429 F.3d 1109 (D.C. Cir. 2005)**

Emily Plett-Miyake, 3L, Vermont Law School

In November, the U.S. Court of Appeals for the District of Columbia found that GrassRoots Recycling Network, Inc. (GrassRoots) did not have standing to seek review of the Environmental Protection Agency's (EPA's) rule allowing the director of an approved state landfill permitting program to issue research, development, and demonstration permits, and granting variances from certain criteria set by the EPA for sanitary landfills.



Photograph courtesy of ©Nova Development Corp.

Background

The Resource Conservation and Recovery Act (RCRA)[1] established "a comprehensive federal program to regulate the handling and disposal of solid waste."[2] There are two portions of the RCRA that the court considered in this case. The first is 42 U.S.C. §§ 6943(a)(3) and 6944(a)-(b), which require the EPA to "promulgate regulations containing criteria for determining which facilities shall be classified as landfills and which shall be classified as [prohibited] open dumps."[3] States are responsible for enforcing the minimum criteria required by the EPA for landfills, and must develop approved solid waste management plans that provide for the closing of all "open dumps." The second relevant portion of RCRA is 42 U.S.C. § 6981(a)(6). Under this portion of RCRA, the EPA is instructed to conduct and encourage the coordination of research and development of new and improved methods of collecting and disposing of solid waste.

With hopes of stimulating new technological developments and alternative disposal processes for municipal solid waste, the EPA issued the Research, Development, and Demonstration Rule (RD&D Rule), allowing the director of an approved state landfill permitting program to issue research, development and demonstration permits granting variances from certain EPA criteria. One of the functions of these permits is to authorize the owner or operator of a landfill to use a design that does not conform to the usual criteria for run-on systems, the requirements for final cover, and the prohibition on adding liquids.[4] The issuance of these permits is contingent on the inclusion in the permit of "terms and conditions at least as protective as the criteria [for municipal solid waste land fills] to assure protection of human health and the environment."[5]

The GrassRoots Recycling Network (GrassRoots) is an activist organization seeking to "eliminate the

See Grassroots, page 12

Town Loses Challenge to Airport Plan

Appeals Court Defers to FAA

***City of Oxford, Ga. v. Federal Aviation Admin.*, 428 F.3d 1346 (11th Cir. 2005)**

Alina Johns, 3L, Stetson University College of Law[1]

Introduction

In 2004 the Federal Aviation Administration (FAA) determined that a proposal by the City of Covington, Georgia (Covington) to renovate the Covington Municipal Airport complied with the applicable regulations and procedures regarding air quality, environmental impact, and the historical significance of the nearby town of Oxford. The City of Oxford (Oxford) petitioned for review of the agency's decision, raising a number of objections relating to the project and alleging that not all proper procedures were followed. Oxford challenged the agency's actions on five counts.

Challenge One

First, Oxford asserted that the FAA failed to adequately consider the environmental impact of the project in conjunction with two related projects: the widening of the nearby highway and the construction of a new terminal building. Oxford argued that the proposed airport plan would, by necessity, require the widening of the highway in the future, and that language in the plan indicated that a new terminal building might be built as well. Oxford contended that these projects had to be considered by the FAA alongside the project at issue when determining its environmental impact.

Under the National Environmental Policy Act (NEPA), federal agencies like the FAA are required to examine the environmental impact of the projects they approve. The agency first performs an environmental assessment to determine if the project will have a significant impact on the environment. If there will be a significant impact the agency must prepare a detailed environmental impact statement. If not, the agency issues a "finding of no significant impact" (FONSI) and performs no additional research into potential impacts. The FONSI must explain why further research is deemed unnecessary. This procedure requires that a project be considered in conjunction with related past, present, and reasonably foreseeable future projects so that the potential cumulative impact will be assessed.

In response to Oxford's challenge the court reasoned that the possible widening of the highway was not so foreseeable that it must be considered in conjunction with this project. Likewise, the fact that potential construction of a new terminal building was mentioned in the plan did not render that particular project "foreseeable" enough to require a cumulative impacts analysis.

Challenge Two

Oxford raised a second objection to the project based on its impact on air quality. The FONSI was based in part on the understanding that the county in which the airport is located is "in attainment" of air quality standards. This belief turned out to be erroneous. However, Oxford apparently admitted at some point in the proceedings that the FAA had reassessed the air quality impacts (presumably using accurate data; the court does not elaborate) so the court declared the issue moot.

Challenge Three

Oxford further contended that there was insufficient oversight by the FAA of the independent contractor who was hired to complete the environmental assessment. The court determined that oversight is not required by NEPA regulations, provided that the agency takes responsibility for the project.

Challenge Four

Oxford argued that the FAA violated the National Historic Preservation Act (NHPA) by approving the airport renovation plan without adequately considering the town's historical properties. (Part of Oxford is listed on the National Register of Historic Places.) Any agency seeking to build near a place which is deemed to have historical significance is required to fill out the necessary paperwork and provide it to any interested consulting parties. If no consulting party raises an objection within thirty days of the papers being provided, then the project may go forward. If a party makes a complaint, then the agency must make an attempt to appease them.

In this case Oxford made such a complaint and asked for more consultation. The FAA decided not to hold a meeting to address the town's issues on the grounds that further meetings would not be useful. The court held that since previous meetings had been held

See City of Oxford, page 11

Wetlands Mitigation, from page 1

impact fifteen of the 230 acres of delineated wetlands on the property. The permit was granted subject to mitigation in the form of new wetlands creation.

In 1998 the Normans filed for another 404 permit, this time seeking permission to impact additional wetlands that lay scattered across the property. In 1999, after considerable negotiation, the Corps of Engineers approved a second permit that allowed for up to sixty acres to be filled. The mitigation plan for this permit included the creation and transfer of 195 acres of new wetlands but allowed areas designated for storm water run-off - retention ponds - that were already provided for in the revised master plan to satisfy a considerable portion of this requirement. The plan was subsequently implemented through the transfer of approximately 221 acres of retention ponds and other newly created wetlands to a non-profit property owners' association. However, both before and after the second 404 permit was issued the Normans had been engaged in selling portions of the property to third party developers and others. When the 1999 permit was issued the Normans retained ownership of only 716 acres of the original parcel.

Lawsuit and Subsequent Appeal

In 1995, following the approval of their first 404 permit application, the Normans brought suit in the Court of Federal Claims. The complaint charged that their 1988 purchase agreement with Southmark for 470 acres was based upon the Corps of Engineers' 1988 delineation and that the net increase in jurisdictional wetlands between the 1988 and 1991 delineations located within that 470-acre parcel - approximately seventy acres - represented a taking.

The subsequent procedural history of the suit is long and tortuous. In 2001 the complaint was amended to include an illegal exaction claim[1] that was eventually dismissed by the trial court for lack of jurisdiction. By November 2003 the case was finally ready to go to trial. The Normans then moved to retroactively amend their complaint to increase the amount of the alleged taking from seventy acres to 221 acres - the full amount they had transferred to the property owners' association. The motion to amend was granted on the first day of trial. Following conclusion of the trial the court issued an opinion and order denying all of the Normans' takings claims and dismissing their amended complaint.

The Normans appealed the trial court's rulings on their takings claims as well as their illegal exaction claim to the U.S. Court of Appeals, Federal Circuit. Their appeal essentially argued that the trial court had erred by failing to consider that the Corps of Engineers' revocation of the 1988 delineation and subsequent issuance of the 1991 delineation set into motion a chain of events that culminated in the taking of the 221 acres nearly ten years later, thus rendering their takings claims meritorious.

As to the dismissed illegal exaction claim, the Normans argued that the Corps of Engineers' 1991 delineation had violated the Energy and Water Development Appropriations Act of 1992 (EWDA),[2] which forbade the expenditure of public funds for delineations using the Corps' 1989 Wetland Delineation Manual. Since the 1991 delineation had led, according to the Normans, "foreseeably and predictably" to the 221-acre mitigation, and since that mitigation constituted an exaction in return for the Corps' approval of the Normans' second 404 permit application, the exaction occurred in violation of a federal statute, thus bringing the illegal exaction claim under the subject matter jurisdiction of the Court of Federal Claims.

The Appeals Court's Analysis

The appeals court noted from the outset of its analysis that the Normans' takings claims did not challenge the government's legitimate authority to require mitigation in return for granting approval to impact wetlands or waters of the U.S. over which the Corps has jurisdiction. Rather, the Normans' essential argument was that the entire sequence of events from the issuance of the first Corps of Engineers delineation in 1988 to the transfer of the 221 acres in 1999 should be considered as a single event since the 1991 delineation directly and ineluctably caused them to lose 221 acres of property.

The court found this argument unconvincing. It pointed out that the appellants did not even acquire the majority of the 221 acres set aside under the 1999 mitigation plan until 1994. The court expressed the opinion that "[t]he causal relationship between the revocation of the 1988 Delineation and the appellants' alleged loss is simply too attenuated to support the weight the Normans place on it."[3] This conclusion alone, according to the court, was sufficient to dispense with the bulk of the appellants' takings claims.

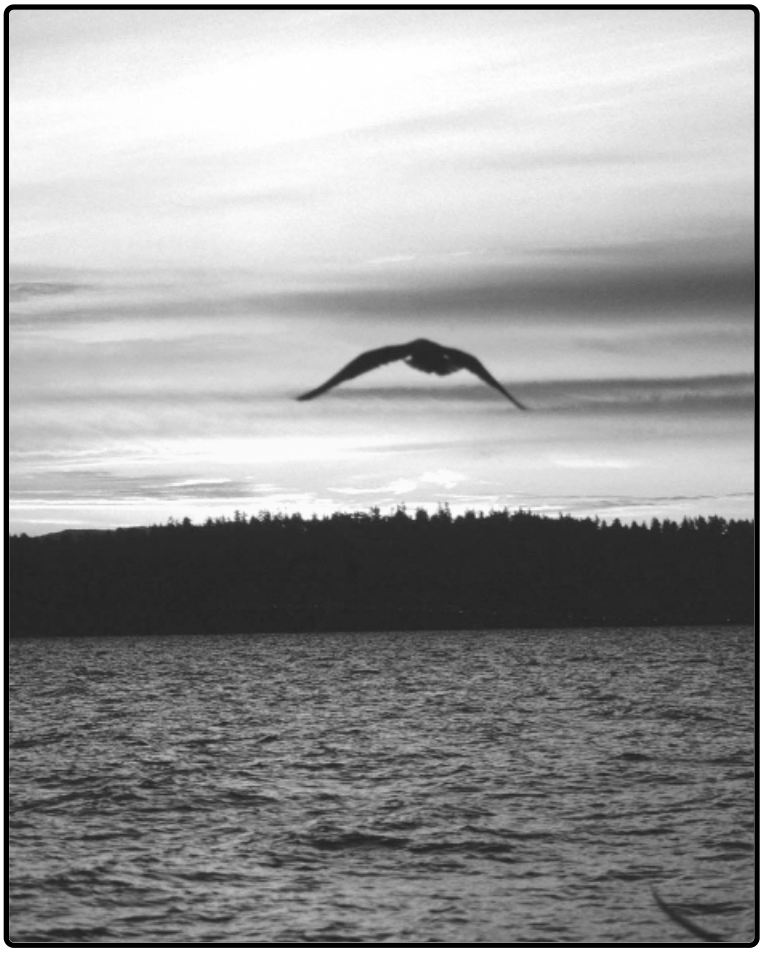
Nevertheless, the court proceeded to provide a detailed analysis of the Normans' arguments - and why they had to fail. First, the court considered the Normans' claim that the 1999 permit constituted a physical taking because it required the Normans to transfer title to the 221 acres to a third party. In fact, the permit did not specifically require such a transfer; it only required the Normans to record the formation of a

"Corps approved funding mechanism for the long term maintenance of the mitigation and preserve areas." Transferring the property to a conservation group or non-profit property owners' association was one such mechanism that the Corps approved. There were other options available to the Normans; they voluntarily chose to transfer the property. Thus it was plainly evident to the court that the transfer could not be the basis for a successful physical takings claim.

Continuing with its analysis, the court opined that even if the transfer could be characterized as a physical taking, the Normans' claim for compensation would fail since the U.S. Supreme Court has held that a land use regulation "does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land" provided that there is an "essential nexus" between the permit condition and the legitimate state interest.[4] The appeals court here agreed with the lower court that in this case "the public interest served…relate[d] directly to the condition imposed."[5]

Moreover, since the property conveyed was essentially all earmarked as storm water run-off storage areas by the Normans' master development plan, the transfer of that property did not impact its "economically viable use" to any appreciable degree.[6] As to the appellants' categorical takings claim, the court cited binding and persuasive precedent that a regulatory taking becomes categorical "only if the owner is deprived of all beneficial use of the parcel as a whole."[7] Since the trial court had considered the entire 2,280 acres to constitute the "parcel as a whole," and since the Normans' appeal had not challenged the trial court's analysis on this point, "appellants cannot dispute that court's conclusion that the facts here do not sustain a categorical takings claim."[8]

The court considered the Normans' regulatory taking claim arguments under the three factor balancing test provided by the U.S. Supreme Court in *Penn Central Transp. Co. v. New York City*.[9] In *Penn Central* the Supreme Court defined these three factors as: "(1) the extent to which the regulation has interfered with…reasonable investment-backed expectations; (2) the economic impact of the regulation on the claimant; and (3) the character of the governmental action at issue."[10] Reviewing the trial court's findings of fact under the deferential "clearly erroneous" standard, the appeals court here found that the trial court was correct in its conclusion that the Normans had a reasonable investment-backed expectation with respect to only four of the 221 acres in dispute. Moreover, although a takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction," the fact that the Normans were actually and constructively aware of the restrictions imposed by the 1991 delineation prior to their purchase of the other 1,800 acres of property made it difficult to show that they had "bought their property in reliance on a challenged regulatory scheme."[11] Here too the court found the appellants' arguments of regulatory taking to be unpersuasive.



Photograph of wetlands courtesy of ©Nova Development Corp.

Finally, in considering the appellants' illegal exaction claim the court found that the lower court lacked subject matter jurisdiction based on the fact that the EWDA was merely an appropriations act and that, as such, the supposed exaction could not have been "due to a misapplication" of the statute as required by the controlling case

See Wetlands Mitigation, page 14

Red Grouper, from page 4

"such information may not be exact or totally complete."[12] After reviewing the Administrative Record, especially Secretarial Amendment 1, the court held in favor of the defendants because "characterizing a fishery as overfished is a matter of experience and expertise as well as scientific evidence."[13] The court gave deference to the agency's methods because they were in the best position to decide what methods to use and there was no clear error.

Environmental Assessment

Lastly, the plaintiffs claimed the defendants violated the National Environmental Policy Act (NEPA) "by not adequately addressing the environmental circumstances regarding overfishing of red grouper."[14] Again, there is a link between NEPA and APA. The plaintiffs asserted that "[b]ecause the environmental assessment was inadequate…the interim rule [was] arbitrary, capricious, contrary to law, and an abuse of agency discretion."[15] In this situation the court is to make sure that the agency has taken a "hard look" at the environmental consequences of its action.[16] Under NEPA an agency must prepare an environmental assessment to determine whether or not an environmental impact statement is necessary. Here, NMFS considered many studies and reviewed comments and opinions from members of the recreational fishing industry before it prepared its environmental assessment and issued a finding of no significant impact. The court held that these measures were sufficient evidence that NMFS took a "hard look" at the environmental consequences of its decision.

Conclusion

The District Court upheld the interim rule regarding red grouper. The methods used to determine that red grouper is overfished were the best methods available, and NMFS had sufficient information to determine that the interim rule would not significantly affect the environment.

However, the reduction of the aggregate grouper bag limit and closure for recreational fishing for all grouper species in the Gulf of Mexico for November and December 2005 were found to be invalid and struck down by the court. Therefore, the interim rule is specific to red grouper and fishermen still have the flexibility to fish for other grouper and reef fish species.

ENDNOTES

1. The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) adopted the "arbitrary and capricious" standard set out in the Administrative Procedure Act (APA). This standard gives deference to agency decisions by reviewing for clear error. A regulation will be found to be arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Coastal Conservation Assn. v. Gutierrez,* 2005 WL 2850325 at *4 (M.D. Fla. 2005).
2. The Gulf of Mexico Fishery Management Council manages federal fishery resources off the coasts of Texas, Louisiana, Mississippi, Alabama, and Florida.
3. The Magnuson-Stevens Act defines the terms "overfishing" and "overfished" to mean "a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis." 16 U.S.C. § 1802(29). Maximum sustainable yield is the "largest long term average catch or yield that can be taken from a stock complex under prevailing ecological and environmental conditions." 50 C.F.R. § 600.310(c)(1).
4. *Coastal Conservation Assn.* at *3.
5. *Id.* at *4 (quoting Administrative Record).
6. *Id.*
7. *Id.*
8. Fisheries of the Caribbean, Gulf, and South Atlantic, 70 Fed. Reg. 42485, 42511-42512 (July 25, 2005) (to be codified at 50 C.F.R. pt. 622).
9. *Coastal Conservation Assn*. at *6.
10. *Id.* at *3.
11. *Id.* at *7.
12. *Midwater Trawlers Coop. v. Dept. of Commerce,* 393 F.3d 1003 (9th Cir. 2004).
13. *Coastal Conservation Assn*. at *8.
14. *Id.* at *9.
15. *Id.*
16. *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 546 (11th Cir. 1996).

City of Oxford, from page 7

for other complaining parties and since the court must defer to the agency's judgment unless it appears to lack a rational basis, the FAA's actions were justified and the project could go forward.

Challenge Five

Oxford asserted that the methodology the FAA utilized to assess noise impacts was insufficient. The agency used a day-night average sound level (DNL) of 65 dB as the standard; noise levels below 65 dB would thus be acceptable. The 65 dB DNL is generally considered adequate for all land uses. However, FAA regulations allow for a stricter standard if local conditions demand one. Oxford argued that the FAA should have used a stricter DNL in this case because of the town's historic character. The court refused to substitute its judgment for that of the agency and rejected Oxford's plea.

Photograph courtesy of ©Nova Development Corp.

Conclusion

The City of Oxford raised multiple challenges to the FAA's approval of the Covington Municipal Airport's renovation plan, but the court deferred to the agency's judgments and rejected Oxford's petition for review.

ENDNOTES

1. *Water Log* editor Josh Clemons contributed additional material to this article.

Chemical Waste, from page 3

payer [Nichols] is liable to replenish the public treasury for the tax reduction that was wrongfully granted to ChemWaste. The tax reduction has resulted in a probable net increase in [Nichols'] taxes since the reduction went into effect."[4] With the alleged injury, the court found that Nichols had standing and ChemWaste's motion to dismiss was properly denied by the lower court.

Separation of Powers

Arguably, the characterization of the fee reduction as a tax abatement has expanded the ability of a taxpayer to challenge the policy and practices of the Department. The court granted Nichols standing to challenge the Department's interpretation of another's tax liability; however, Nichols was not a party to the revenue ruling and language in the complaint stated above is not specific.

The dissenting justice explained that because these challenges will be carried out through the courts, the judiciary could exercise oversight over the collection of taxes, a function that is traditionally held by the executive branch of government. Where there is no actual injury to another, this judicial review is inappropriate as an interference into the affairs of the Department, an agency of the executive branch.

Conclusion

The extent to which the court's decision expands taxpayer standing and operates as a precursor to the disregard of the separation of powers doctrine is unknown. However, because the court did not require a showing of specific facts indicating a likelihood of a tax increase, taxpayers seem able to better withstand a motion to dismiss for lack of standing when challenging a tax abatement.

ENDNOTES

1. *Ex Parte Chemical Waste Management*, 2005 WL 3083492, at *1 (Ala. Nov. 18, 2005).
2. *Id.* at *2.
3. *Id.* at *3.
4. *Id.* at *5.

Grassroots, from page 6

waste of natural and human resources — to achieve Zero Waste" using "classic activist strategies to achieve corporate accountability for waste and public policies to eliminate waste, and to build sustainable communities."[6] GrassRoots petitioned for the review of the RD&D rule, claiming that it was beyond the powers of the EPA to issue, and arguing specifically that in issuing the rule the EPA "violated the RCRA by delegating to the States the 'authority…to implement the [RD&D] permit process' and 'to waive certain national criteria' for sanitary landfills."[7]

Court Decision

The Court of Appeals, reviewing the decision of the EPA to promulgate the rule, focused on the standing to sue that is required by Article III of the U.S. Constitution. The court noted that the "'irreducible constitutional minimum of standing' has three elements: (1) injury in fact, (2) causation, and (3) redressability."[8] In the situation at hand, the court found that in order for GrassRoots to have standing to sue on behalf of its members it must meet the following conditions for associational standing: "(1) at least one of its members [must] have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit."[9] The court also noted that the burden was squarely on GrassRoots to support each element of its claim to have standing.

Seeking to meet this burden, GrassRoots submitted affidavits of two group members describing injuries they claimed to have suffered as a result of the RD&D rule. The group members claimed that they would not have bought their properties had they known that nearby landfills would be turned into "bioreactors" under the rule.[10]

The court rejected these claims of injury, however, noting that neither "is evidence of the 'actual or imminent' injury in fact required for standing to sue."[11] Rather, the future harms alleged by the individuals were, according to the court, "although by no means impossible,…neither actual nor imminent but wholly conjectural."[12]

Conclusion

The court, finding that nothing in the record showed actual or imminent harms or injuries to the plaintiff or its members by the RD&D rule, held that GrassRoots did not meet the minimum constitutional requirements for associational standing. The court accordingly dismissed the petition.

ENDNOTES

1. 42 U.S.C. § 6901 *et seq.*
2. *GrassRoots Recycling Network, Inc. v. U.S. Envtl. Protection Agency*, 429 F.3d 1109, 1110 (D.C. Cir. 2005).
3. *Id.*
4. *Id* at 1111.
5. *Id.*
6. GrassRoots Recycling Network <www.grrn.org/general/who.html>.
7. *GrassRoots* at 1111.
8. *Id.* at 1111-12 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).
9. *Id* at 1111.
10. A bioreactor is a landfill that "uses liquid in order to increase the rate of biodegradation." *Id.*
11. *Id* at 1112.
12. *Id.*

FERC, from page 5

noted that "our earlier decision permitted the pipeline to be built, so general harms stemming from construction [or realignment] of a pipeline do not confer standing for this lawsuit."[5]

NCNR raised four additional issues. The first was whether East Tennessee's prior effort to drill under the New River should have been declared a "failure" under Condition 22 of the FERC certificate, which would have allowed East Tennessee to abandon drilling in favor of a better site.[6] The court declared that this condition conferred no right upon NCNR. The court further found that the issue was moot, as the pipeline resulting from the drilling had been in operation for over two years, and that having succeeded, "the drilling effort patently was not a failure."[7]

The second additional issue was procedural, with NCNR arguing that it was entitled to service of documents by East Tennessee after certification. The court disagreed, and found that NCNR had no such procedural right. As explained by FERC, "its rules do not require that all parties to a certification be served with documents after certification is finished."[8] Finding that there was no procedural right to post-certification service, the court ruled that NCNR had no standing to bring this particular challenge.

The third additional issue was another procedural claim, in which NCNR argued that a FERC order was invalid because it was not signed by the Director of the Office of Energy Projects, but rather by the Deputy Director. The court dismissed this claim as frivolous, noting that signing responsibilities can be delegated to specified officials in the same office. NCNR failed to articulate what interests it believed were at risk, and the court declined to believe that such action was that of a "rogue deputy" acting surreptitiously against the Director's will.[9]

The final issue raised was NCNR's appeal of a FERC order rejecting the claim that East Tennessee failed to consider a particular route alternative. The court noted that these issues had been raised and settled in previous appeals, and declined the invitation to look at them again.

Conclusion

Rejecting all of NCNR's claims, the court found that the group lacked standing to bring many of the issues, and had failed procedurally against others. The court therefore lacked jurisdiction and dismissed the petition for review.

ENDNOTES

1. 15 U.S.C. §717f.
2. *National Comm. for the New River, Inc. v. Federal Energy Reg. Commn.*, 2005 WL 3440696 at *2 (D.C. Cir. Dec. 16, 2005) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id* at *3.
9. *Id.*

Photograph of bog turtle courtesy of the U.S. Army Corps of Engineers

Wetlands Mitigation, from page 9

law.[12] The court also observed that invoking federal claims court jurisdiction in these circumstances was conditioned on a demonstration by the appellants that the supposed exaction occurred "as a direct result of the application of" the EWDA, a showing that the Normans failed to make with sufficient verity.[13] Even if the Normans could have successfully demonstrated that an illegal exaction had occurred as a direct result of the misapplication of the EWDA, that statute does not provide, either directly or by implication, any cause of action for its violation with a remedy for money damages.

Conclusion

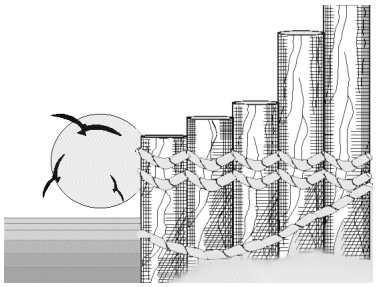
The Court of Appeals, Federal Circuit upheld the Court of Federal Claims ruling that the conditions on the Normans' wetlands fill permit did not constitute a physical, categorical, or regulatory taking of their property by the government, and that the Court of Federal Claims did not have subject matter jurisdiction over appellant's claim that the property conveyed constituted an illegal exaction.

ENDNOTES

1. An exaction is a "wrongful demand of a reward or fee for an official service performed in the normal course of duty." *Black's Law Dictionary* 238 (Bryan A. Garner ed., pocket ed., West 1996).
2. Pub. L. No. 102-104 (1991).
3. *Norman v. U.S.*, 429 F.3d 1081, 1088 (Fed. Cir. 2005).
4. *Id.* at 1090 (citing *Nollan v. California Coastal Commn.*, 483 U.S. 825, 834 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994)).
5. *Id.*
6. *Id.* (citing *Norman v. U.S.*, 63 Fed. Cl. 231, 261 (Fed. Cl. 2004)).
7. *Id.* (citing cases).
8. *Id.*
9. 483 U.S. 104 (1978). Unlike a physical taking, in which the government takes actual physical control of property, a regulatory taking is merely a reduction in the value of a property resulting from a government regulation.
10. *Id.* at 124.
11. *Norman*, 429 F.3d at 1093 (citing *Cienega Gardens v.U.S.*, 331 F.3d 1319, 1345-46 (Fed. Cir. 2003)).
12. *Id.* at 1095 (internal citations omitted).
13. *Id.* at 1096.

Photograph courtesy of ©Nova Development Corp.

Lagniappe *(a little something extra)*



Around the Gulf...

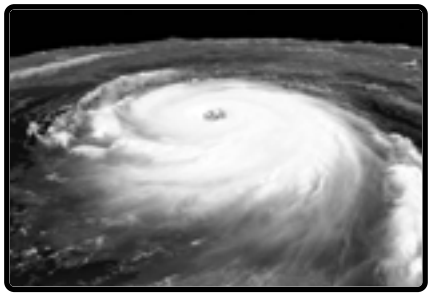
The drama of **Big Hill Acres**, which has been covered in past issues of *Water Log*, may finally be over. The real estate developers who sold federally protected wetlands with inadequate septic systems as mobile home lots, along with the engineer who designed the septic systems, have been sentenced by the U.S. District Court in Gulfport. Robert J. Lucas and Robbie Lucas Wrigley, the developers, were sentenced to eight years and seven years, three months, respectively, in federal prison. M.E. Thompson Jr., the engineer, was sentenced to seven years, three months in federal prison. The defendants are liable for $1.4 million in mitigation costs and over $5 million in fines. The defendants' attorney has said they will appeal the decision to the Fifth Circuit and, if necessary, the U.S. Supreme Court.

The Gulf of Mexico Fishery Management Council has approved changes in fishing regulations that may allow **Gulf commercial red snapper fishers** to ply their trade more efficiently. The new rules would replace the existing monthly 10-day "derbies" with a year-round fishery with catch limits on individual boat owners. A commercial fisher would be allowed to sell the unfilled portion of his or her quota to another commercial fisher (but not to a recreational fisher). Commercial fishers are generally supportive of the changes. A final decision on the rule change should be made by July 2006.

NOAA has revised **Coastal Zone Management Act consistency regulations,** primarily relating to energy projects. The Final Rule was published in the Federal Register on January 5, 2006, and may be viewed at http://coastalmanagement.noaa.gov/czm/fedcon_rule2006.html.

The EPA has issued the ***Draft Handbook for Developing Watershed Plans to Restore and Protect Our Waters*** to provide guidance to communities, watershed groups, and governmental agencies. Topics include quantifying existing pollutant loads, developing estimates of the load reductions needed to meet water quality standards, developing effective management measures, and tracking the progress of an implemented plan. EPA is accepting comments on the handbook, which may be downloaded at http://www.epa.gov/owow/nps/watershed_handbook/.

Mississippi politicians unhappy with the way State Farm has handled their **Hurricane Katrina-related insurance claims** have joined the thousands of other victims who are suing the company. Sen. Trent Lott, who lost his house in Pascagoula, and Rep. Gene Taylor, who lost his house in Bay St. Louis, are being represented by Lott's brother-in-law Dickie Scruggs, who is well known in Mississippi for his success in suing tobacco companies. The crux of the lawsuit is whether damage from the storm surge should be considered flooding, which is not covered under many hurricane insurance policies.



Photograph of Hurricane Katrina courtesy of NOAA

Former presidents **Bill Clinton and George H.W. Bush** helped to raise over $90 million for relief efforts in response to Hurricane Katrina. A third of the money in the Bush-Clinton Katrina Fund is going to colleges and universities, $20 million is going to religious institutions, and the remaining $40 million will be divided among the affected states. Alabama will receive $3.2 million, Mississippi $12.2 million, and Louisiana will get the lion's share of $24.4 million.

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., U.S. Army Corps of Engineers and NOAA.

MASGP-05-017-04

This publication is printed on recycled paper.
February, 2006

... *Upcoming Conferences* ...

•APRIL 2006 •

7th Int. Conference on Urban Drainage Modelling & 4th Int. Conference on Water Sensitive Urban Design
April 3, 2006, Melbourne, Australia
http://www.icms.com.au/UDMandWSUD

2nd National Water Education Conference - From the Waters Edge to the Red Centre
April 18-21, Alice Springs, Northern Territory, Australia
http://www.awa.asn.au/events/educationconf06

•MAY 2006 •

7th International Conference on the Environmental Management of Enclosed Coastal Seas
May 9-12, 2006, Caen, France
http://www.emecs.org.jp/

Aqua 2006
May 9-13, 2006, Firenze, Italy
http://www.was.org

14th International Conference on Aquatic Invasive Species
May 14-19, 2006, Key Biscayne, FL
http://www.icais.org

Integrated Water Resources Management & Challenges of Sustainable Development
May 23, 2006, Marrakech, Morocco
http://www.ucam.ac.ma/gire3d

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