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Editors: Jim Wilkins and Lisa C. Schiavinato
Layout: Jessica Schexnayder

Sea Grant Legal Program
227B Sea Grant Building, LSU
Baton Rouge, LA 70803

(225)578-5931 / FAX (225)578-5938
E-mail: sglegal@lsu.edu
WWW: http://www.lsu.edu/sglegal

# Advisory Base Flood Elevations: What They Are and How They Will Impact Your Community

By Melissa Trosclair Daigle

## Introduction

In response to the devastation of Hurricanes Katrina and Rita during the 2005 hurricane season, the U.S. Department of Homeland Security's Federal Emergency Management Agency (FEMA) decided to address and revise some of its outdated policies and data. Areas of concern include phasing out subsidized premiums, increasing participation, addressing repetitive loss properties, and updating the Flood Insurance Rate Maps (FIRMs).[1] FEMA expects to issue renewed copies of FIRMs for many coastal Louisiana parishes by the end of 2006. Before the new flood insurance rate maps become effective, they must go through a formal appeals and adoption process.[2] However, many home and business owners wishing to rebuild cannot wait until the adoption of the new FIRMs; they need information now in regards to how to best protect their homes and business in the future as they begin to rebuild. Because of this, FEMA has issued Advisory Base Flood Elevations (ABFEs) to assist communities in the rebuilding process.

ABFEs were created by FEMA. For some parishes, FEMA created them with the assistance from the U.S. Army Corps of Engineers. Each parish assessment of the 1 percent annual chance (or 100-year) flood Stillwater Elevations (SWEL) considered information such as storm data from the past 35 years, new and existing long-term tidal gage records, and land subsidence, where applicable.

While the ABFEs differ from parish to parish, many are based on the freeboard system. According to the underlying statute, freeboard is

> a factor of safety usually expressed in feet above a flood level for purposes of floodplain management [… and] tends to compensate for the many unknown factors that could contribute to flood heights calculated for a selected size flood and floodway conditions, such as wave action, bridge openings, and the hydrological effect of urbanization of the watershed.[3]

In many parish areas where freeboard is used, a one-foot addition to the existing FIRM Base Flood Elevation (BFE) is sufficient. For example, if the FIRM BFE is set at 12 feet, the ABFE would be set at 13 feet. However, there are some instances where the freeboard is set at a height greater than one foot, or where the freeboard system is not used at all. The requirements for each specific parish will be discussed below.

Although FEMA cannot force a parish to adopt the new ABFEs, there are some situations in which the builder must follow the recommended elevation. For instance, if reconstruction is funded through the Public Assistance Program,[4] the Hazard Mitigation Grant Program,[5] the Pre-Disaster Mitigation Grant Program,[6] or the Flood Mitigation Assistance Program[7], Louisiana communities must follow the new elevation guidelines.[8] Additionally, Executive Order 11988: Floodplain Management requires federal agencies to consider the implications of federal construction projects.[9] The guidelines are not mandatory for rebuilding if funded by FEMA's Individual and Households Assistance housing reimbursement grants[10]. However, parishes are encouraged to adopt the new standards and homeowners should check local ordinances for the rebuilding levels.

In fact, many parishes, through the parish councils, have adopted the revised ABFEs. One of the benefits of adopting the revised ABFEs is that

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current FIRMs may not provide adequate protection to buildings should another disaster occur.[11] If a parish desires to adopt them, FEMA advises that they do so formally in order to make it legally enforceable.[12] FEMA recommends that the following or similar language be used when amending the floodplain management regulations:

> The base flood elevations used for the purpose of administering this ordinance shall be established by the Building Official (or Floodplain Administrator) using the methodology described in FEMA's Flood Recovery Guidance for _____ Parish, dated _____. The Flood Recovery Guidance shall also be used by the Building Official as the basis for determining the landward boundary of the floodplain.[13]

Additionally, if a community wishes to adopt the use of freeboard, FEMA encourages the community to do so by reflecting the change in the ordinance.[14] Once the ABFEs are adopted, builders of new construction or substantially damaged construction must meet this height requirement in order to receive a building permit. Parishes that choose to adopt the ABFEs and/or freeboard elevations will be able to receive Increased Cost of Compliance (ICC) funds in order to help cover the cost of raising buildings to the ABFEs. Communities that do not adopt the ABFEs will only be able to receive ICC funds to cover the costs of raising the building to the BFE on the current FIRM.[15] Other requirements for receiving the ICC benefits include having the community "declare the building to be substantially damaged by flood by the time the repair permit is issued by the community" and "enforce the ABFE or BFE uniformly throughout the community."[16]

A Look at Specific Parish ABFEs

***Calcasieu*** – FEMA encouraged Calcasieu Parish to adopt a 1-foot freeboard. This would have the effect of requiring construction to be at least one foot above the current BFEs.[17] In May 2006, Calcasieu Parish formally adopted new base flood elevations. The BFE was increased by 1 foot in most areas, but in some areas the BFE was increased by two feet.[18]

***Cameron*** – FEMA encouraged Cameron Parish to adopt a 1-foot freeboard. This would result in construction being raised at least one foot above the current BFEs.[19] The parish formally adopted the ABFE without any changes.[20]

***Iberia*** – FEMA encouraged Iberia Parish to adopt a 1-foot freeboard. This would have the effect of requiring construction to be at least one foot above the current BFEs.[21] The parish adopted the ABFE on June 14, 2006.[22]

***Jefferson*** – FEMA issued two separate ABFEs for the parish, one for areas inside levee protection and one for areas outside of levee protection. For areas inside levee protection, FEMA predicts that levee certification is likely.[23] In this area, new construction and substantially damaged buildings within a designated FEMA floodplain should be elevated either to the BFE on the existing FIRMs or 3 feet above the highest existing adjacent grade at the building site, whichever is higher, while new construction and substantially damaged buildings outside a designated FEMA floodplain should be elevated at least 3 feet above the highest adjacent existing ground elevation at the building site.[24] If the levees are not certified, "outside levee protection" ABFEs would apply. The ABFE for areas outside of levee protection is formulated using a freeboard of 1 foot.[25]

Jefferson Parish formally adopted the ABFEs on July 19, 2006. The parish gave the citizens until August 28, 2006, the date set for the opening of the Louisiana Housing Center in Jefferson, to secure a permit to be grandfathered-in under the old elevation rules.[26]

***Lafourche*** – FEMA encouraged Lafourche Parish to adopt a 1-foot freeboard. This would have the effect of requiring construction to be at least one foot above the current BFEs.[27] On August 8, 2006, the council voted against adopting the ABFEs issued for the parish.[28]

***Orleans*** – FEMA issued two separate ABFEs for Orleans Parish, one for areas inside levee protection and one for areas outside of levee protection. For areas inside levee protection, FEMA predicts that levee certification is likely.[29] In this area, new construction and substantially damaged buildings within a designated FEMA floodplain should be elevated either to the BFE on the existing FIRMs or 3 feet above the highest existing adjacent grade at the building site, whichever is higher, while new construction and substantially damaged buildings outside a designated FEMA floodplain should be elevated at least 3 feet above the highest adjacent existing ground elevation at the building site.[30] If the levees are not certified, "outside levee protection" ABFEs would apply. The ABFE for areas outside of levee protection is formulated using a freeboard of 1 foot.[31]

FEMA and New Orleans officials have struck a compromise on the ABFEs, which includes some changes from the elevations recommended. Mike Centineo, Director of Safety and Permits for the City of New Orleans, introduced an ordinance to the city council. The ordinance requested that the city council adopt an elevation of 3

feet, but excluded locally protected historic districts. The historic districts include 12 neighborhoods. The French Quarter, protected by the Vieux Carre Commission, would likewise be exempted.[32]

The parish adopted the compromise unanimously on August 25, 2006, after two hours of discussion.[33] The adoption was driven by the desire to make sure federal money was given to the parish to help with rebuilding.[34]

***Plaquemines*** – FEMA has issued three ABFEs for Plaquemines Parish, one for areas inside of levee protection and two for areas outside of levee protection. For areas inside levee protection, FEMA predicts that eventual levee certification is likely.[35] In the Belle Chasse area, new construction and substantially damaged buildings within a designated FEMA floodplain should be elevated either to the BFE on the existing FIRMs or 3 feet above the highest existing adjacent grade at the building site, whichever is higher, while new construction and substantially damaged buildings outside a designated FEMA floodplain should be elevated at least 3 feet above the highest adjacent existing ground elevation at the building site.[36] More time is needed to map the remaining areas inside levee protection. If the levees are not certified, "outside levee protection" ABFEs would apply.

Areas outside levee protection have been divided into two sections. For the area located west of the Mississippi River and areas east of the River from the Gulf of Mexico up to Parish ABFE Sub-Basin "h," FEMA has encouraged the adoption of a freeboard of 1 foot.[37] For the area located east of the Mississippi River adjacent to and north of Parish ABFE Levee Sub-Basin "h," FEMA encouraged the adoption of a freeboard of 3 feet. The Parish Council has adopted all of the ABFEs except for those for the Belle Chasse area.[38]

***St. Bernard*** – FEMA has issued three ABFEs for St. Bernard Parish, one for areas inside of levee protection and two for areas outside of levee protection. For areas inside levee protection, FEMA predicts that eventual levee certification is likely. New construction and substantially damaged buildings within a designated FEMA floodplain should be elevated either to the BFE on the existing FIRMs or 3 feet above the highest existing adjacent grade at the building site, whichever is higher, while new construction and substantially damaged buildings outside a designated FEMA floodplain should be elevated at least 3 feet above the highest adjacent existing ground elevation at the building site.[39] If the levees are not certified, "outside levee protection" ABFEs would apply.

Areas outside levee protection have been divided into two sections. For the area located north and east of the Mississippi River Gulf Outlet, FEMA has encouraged the use a freeboard of 1 foot.[40] For the areas located south and west of the Mississippi River Gulf Outlet, FEMA encouraged the adoption of a freeboard of 3 feet.

On April 18, 2006, the parish council moved to introduce proposed ordinances to adopt the ABFEs.[41] However, the ABFEs have not been adopted as parish officials want to give residents a chance to rebuild without being forced to raise their homes.[42] However, those who choose to elevate structures must follow the appearance code adopted by the parish council on June 6, 2006, which includes covering support columns or pilings on all sides on a home raised five or more feet and enclosing the space between the columns.[43]

***St. Charles*** – FEMA issued two separate ABFEs for St. Charles Parish, one for areas inside the levee protection and one for areas outside of levee protection. For areas inside levee protection, FEMA predicts that levee certification is likely.[44] In this area, new construction and substantially damaged buildings within a designated FEMA floodplain should be elevated either to the BFE on the existing FIRMs or three feet above the highest existing adjacent grade at the building site, whichever is higher, while new construction and substantially damaged buildings outside a designated FEMA floodplain should be elevated at least 3 feet above the highest adjacent existing ground elevation at the building site.[45] If the levees are not certified, "outside levee protection" ABFEs would apply. The ABFE for areas outside of levee protection is formulated using a freeboard of 1 foot.[46] The parish council has not yet adopted the ABFEs. The ABFEs were presented to the council in early July, but the council has not yet taken action, and there is no indication when the final decision will be made.[47]

***St. John the Baptist*** – FEMA encouraged St. John the Baptist Parish to adopt a 1-foot freeboard. This would have the effect of requiring construction to be at least one foot above the current BFEs.[48] FEMA did a presentation to the parish concerning the ABFEs on July 27, 2006.[49] The parish council then passed a resolution not to adopt the ABFEs.[50]

***St. Mary*** – FEMA set the freeboard for St. Mary Parish at 1 foot. This would have the effect of requiring construction to be at least one foot above the current BFEs.[51] The ABFEs were adopted by the parish council on August 23, 2006.[52]

***St. Tammany*** – FEMA encouraged St. Tammany Parish to adopt a 1-foot freeboard. This would have the effect of requiring construction to be at least one foot above the current BFEs.[53] The parish council has adopted the ABFEs for some areas in the parish.[54] However, the ABFEs have not been adopted for some areas east and south of I-10, such as Lakeshore Estates and Avery Estates. ABFEs for these areas might not be adopted; in that case, the BFE would change when the new FIRMs are released.[55] Additionally, the city council of Slidell adopted stricter ABFEs for the former Slidell Factory Outlets mall and a vacant parcel near Voters Road. These areas require an elevation of an additional 2 feet.[56]

***Tangipahoa*** – FEMA encouraged Tangipahoa Parish to adopt a 1-foot freeboard. However, in February 2006, FEMA updated the maps, and the revisions allowed for the use of current heights used by the local floodplain administrator in Approximate Zone A.[57] The parish has not yet adopted the ABFEs. They were on the agenda for the September 11, 2006, parish council meeting, but were tabled. Discussion of them may resume the week of September 25, 2006.[58]

***Terrebonne*** – FEMA encouraged Terrebonne Parish to adopt a freeboard of 2 feet. This would have the effect of requiring construction to be at least two feet above the current BFEs. [59] Terrebonne Parish has adopted the ABFEs without any changes. [60]

***Vermilion*** – FEMA encouraged Vermilion Parish to adopt a 1-foot freeboard. This would have the effect of requiring construction to be at least one foot above the current BFEs.[61] The ABFEs were adopted by the parish on March 16, 2006.[62]

Additional Requirements

FEMA also encourages communities that experienced waves with a height greater than 1 foot during Hurricanes Katrina and Rita to adopt V-zone construction methods. V-zone construction methods require buildings to be "elevated on piles or columns so the bottom of the lowest horizontal structural member (usually a floor beam) is above the BFE," which allows waves to pass under the building.[63]

If a community desires, they may adopt higher standards than those set forth in the ABFEs. One example of an additional requirement that FEMA encourages is to require houses to be elevated a full story above ground through the use of pile foundations, even in areas of shallow flooding. Also, commercial and multi-family dwellings are encouraged to raise the first floor by locating parking on the ground level.[64]

Conclusion

FEMA anticipates that the elevations on the upcoming new FIRMs will be similar to the ABFEs issued for the above parishes. However, the final BFEs on the new FIRMs will be dependant on multiple factors, including status of any flood control system improvements and the involvement of the community and the U.S. Army Corps of Engineers in creating a restoration plan.[65] It generally takes a minimum of two years for new FIRMs to be created, appealed, finalized, and approved. Once this occurs, a community participating in the NFIP must adopt the new FIRMs on or before the effective date.[66]

Premiums for flood insurance policies will not be based off of the ABFE; the BFE on the existing FIRM will be used to rate policies. However, communities that participate in the NFIP's Community Rating System can receive discounts by applying for more credit points. In order to receive credit points, a community must implement "floodplain management programs that go beyond the minimum requirements of the NFIP."[67] Generally, owners of buildings built to the ABFE in locations where the ABFE is higher than the BFE can expect to see their premium for floss insurance decrease.[68] While the cost of rebuilding to the ABFE will be more, communities that do so can expect to save $4 for every $1 spent.[69]

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## Rapanos v. United States and Carabell v. United States Army Corps of Engineers

By Melissa Trosclair Daigle

In the consolidated *Rapanos* and *Carabell* case (Rapanos)[1] , the U.S. Supreme Court considered the issue of whether wetlands, which lie near man-made ditches that eventually empty into traditional navigable waters, fall under the category of "waters of the United States" as set forth in the Clean Water Act (CWA). While a majority of the Court found that such wetlands do not constitute "waters of the United States," the justices could not come to a majority opinion that explains exactly how to read Congress' limits on the reach of the CWA.

According to the statute, the CWA's objective is "to restore and maintain [the] chemical, physical, and biological integrity of the Nation's waters."[2] Under the CWA, it is unlawful to discharge fill material into "navigable waters" without a permit.[3] The CWA defines "navigable waters" as "waters of the United States, including territorial seas."[4] Prior to this case, the U.S. Army Corps of Engineers (Corps) interpreted "waters of the United States" to include traditional navigable waters, tributaries of navigable waters, and wetlands adjacent to navigable waters and tributaries.[5]

Facts

The first petitioner, Mr. John Rapanos, backfilled wetlands in April 1989 on a section of property he owned in Michigan in order to begin developing the land. The soil on his land would sometimes become saturated with water. The Michigan Department of Natural Resources classified the land as containing wetlands and informed Mr. Rapanos that in order to fill this land he would need a permit[6] to deposit "dredged or fill material."[7] When considering whether to grant or deny a permit, the Corps considers the factors set forth in the CWA's regulations at 33 CFR § 320.4(a), including the "extent of the public and private need" for the work, any unresolved conflict concerning resource use, and "the extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited."[8] The application process is lengthy and involves cost, but cannot be avoided by the applicant as the fines and prison time imposed are substantial; for example, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in fines for the portion of his land he filled in without a permit. Foregoing the permit application process, Mr. Rapanos filled in wetlands at three sites: one connected to a man-made drain that eventually empties into Lake Huron, one connected to a drain that has a surface connection to the Tittabawasse River, and one connected to a river that eventually flows into Lake Huron.[9] The second petitioner to the case, Mr. Keith Carabell, deposited filled material in a wetland located on his property in Michigan. A man-made ditch connected the wetland to Auvase Creek, which eventually emptied into Lake St. Clair. However, a man-made berm prevented drainage from the wetland to the lake, except for occasional overflow to the ditch.[10]

In the *Rapanos* case, the District Court held that the petitioners were liable for the violations. The lower court reasoned that the wetlands were within federal jurisdiction since they were adjacent to bodies of water that could be classified as "waters of the United States." Mr. Rapanos appealed this decision to the United States Court of Appeals for the Sixth Circuit, which

affirmed the District Court's ruling. The Sixth Circuit held that federal jurisdiction existed because of the "hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters."[11] In Carabell's case, the District Court held that federal jurisdiction existed as the wetland was adjacent to tributaries of navigable waters, which the Sixth Circuit also affirmed.[12]

Plurality Opinion

The Supreme Court's plurality opinion, delivered by Justice Scalia and joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, began by looking briefly at the evolution of case law that dealt with the interpretation of the phrase "waters of the United States." In *U.S. v. Riverside Bayview Homes*, the Court upheld the Corps' decision to include wetlands that abutted on traditional navigable waters in its interpretation of "waters of the United States."[13] Then, 16 years later, the Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* that "nonnavigable, isolated, intrastate waters," which do not "actually abut on a navigable waterway," are not considered "waters of the United States."[14] Since *SWANCC* did not address the issue of tributaries, the Corps continued to assert jurisdiction over traditional navigable water systems, their tributaries, and neighboring waters.

In this case, the plurality held that the term "water" in the phrase at issue "cannot bear the expansive meaning that the Corps would give it."[15] First, Justice Scalia considered the use of the article "the" before "waters." By using the phrase "the waters," Congress limited "the waters" to "relatively permanent, standing, or flowing bodies of water."[16] Additionally, commonsense dictated that the phrase does not include waterways such as man-made ditches and drains.[17] Justice Scalia pointed out that in *Riverside Bayview*, the Court looked to Webster's Dictionary for the definition of "waters" and did not suggest including in the definition "entities other than 'hydrographic features more conventionally identifiable as waters.'"[18] While the plurality decision often used the term "man-made" when describing those bodies of water that are not included in "waters of the United States," it cannot be inferred that the plurality intended for all man-made bodies of water to be immediately excluded from this category. The definition given by the plurality for "waters of the United States" "includes only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, … oceans, rivers, and lakes.'"[19] Man-made streams and lakes cannot be automatically excluded, as many would fulfill the requirement of being relatively permanent, standing, or continuously flowing.

However, for the plurality, it was most important that "the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.'"[20] A "point source" is any channel from which pollutants can be discharged, including ditches and conduits.[21] The use of the two terms indicated to the plurality that "point source" and "navigable water" are two separate categories. Therefore, according to Justice Scalia, the Corps' expansive interpretation "stretch[ed] the outer limits of Congress's commerce power and raise[d] difficult questions about the ultimate scope of that power."[22]

Justice Scalia emphasized that in *SWANCC*, the close connection of the wetland to the "navigable water" was of utmost importance.[23] He then went further to state that only wetlands with a continuous surface connection to "waters of the United States" are to be considered adjacent to such waters and, therefore, covered by the CWA. On the other hand, wetlands that have only an "intermittent, physically remote hydrologic connection" to "waters of the United States" are not covered by the CWA.[24]

With this reasoning in mind, the plurality established a two-part test to determine whether a wetland is covered by the CWA. First, the adjacent channel must contain waters classified as a "waters of the United States," meaning the "waters of the United States" must be relatively permanent and connected to traditional interstate navigable waters. Second, the wetland also must have a continuous surface connection with the "waters of the United States" that is substantial enough to make "it difficult to determine where the 'water' ends and the 'wetland' begins."[25] The plurality made it clear that it did not believe that this test would encourage polluters to dump into bodies of water not covered by the act; in fact, the plurality did not believe the decision would "significantly [affect] the enforcement of §1342, inasmuch as lower courts applying §1342 have not characterized intermittent channels as 'waters of the United States.'"[26] Lower courts still could hold, as they have since the CWA's enactment, that if a pollutant naturally washes downstream then there is a violation of §1311(a), even if it is discharged into an intermittent channel and passes through a conveyance.

Concerning the four wetlands at issue in *Rapanos*, the plurality opinion remanded the case back to the lower court for further proceedings. The lower courts were instructed to determine

whether the ditches and drains are "waters" in the sense that they contain a relatively permanent flow. If they are considered "waters," the lower court must next determine if the wetlands are adjacent to the "waters" by means of a continuous surface connection.[27]

Concurring Opinions

In his concurring opinion, Chief Justice Roberts, who also signed onto Justice Scalia's opinion, pointed out that while agencies are given some leeway in interpreting their organic statute, there must be "some notion of an outer bound to the reach of their authority."[28] When given the chance after *SWANNC* to use rulemaking as a way for the Corps to limit itself, Justice Roberts said the Corps instead decided to remain committed to the idea that it had unlimited power.[29] For the Chief Justice, what is unfortunate about this case is that there is no majority decision "on precisely how to read Congress's limits on the reach of the Clean Water Act."[30]

Justice Kennedy's concurring opinion takes a different approach: he stated the case should be remanded in order for the lower courts to consider the nexus requirement, as presented in *SWANCC*. Justice Kennedy disagreed with the plurality's requirement that the water be either permanently standing or continuously standing for some months: "[t]he merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals though otherwise dry channels would not." [31] As Kennedy pointed out, there are some bodies of water in the western part of the nation, such as the Los Angeles River, that only periodically release water. When the release occurs, however, the water is as powerful as or even more so than rivers that flow throughout the year.[32] The second requirement that a continuous surface connection must exist was also insufficient in his view: "*Riverside Bayview's* observations about the difficulty of defining the water's edge cannot be taken to establish that when a clear boundary is evident, wetlands beyond the boundary fall outside the Corps' jurisdiction."[33]

Justice Kennedy also addressed the issue of increased water pollution that may occur when wetlands are filled. According to Kennedy, while it is true that loose fill could travel downstream, clogging waterways and altering ecosystems, fill that settles to the bottom of the waterway can have just as dangerous an effect.[34] He went further to explain that the wetland(s) in question may have helped in the purification and filtering of water; therefore, the filling of the wetlands may release nutrients, toxins, and pathogens previously trapped.[35] Because the water that would have been stored in the now filled wetlands has nowhere to go, floodwater and impurities that would have been stored there instead flows out into other bodies of water; instead of containing the floodwater, contaminants, and runoff, the filled marshes will divert it to other, possibly more important, bodies of water.[36]

In order to ensure that the Corps does not overstep its bounds, Justice Kennedy would have the agency "establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[37] In most cases, regulation of this sort would "raise no serious constitutional or federalism difficulty."[38] When applying the test to the two consolidated cases at hand, Justice Kennedy found that evidence suggested the possible existence of a significant nexus. In Kennedy's opinion, the *Rapanos* decision should be remanded to see whether the qualities of the wetlands – including, but not limited to, providing habitat, trapping sediment, recycling nutrients, and possible hydrologic connections – are enough to meet the significant nexus requirement.[39] Justice Kennedy emphasized that any hydrologic connection is not enough; the hydrologic connection must be substantial.[40] Likewise, Kennedy stated the decision regarding Mr. Carabell's actions should be remanded in order to consider if there is a significant nexus, particularly concerning the tributaries. Other facts Justice Kennedy would have the reviewing court consider include future runoff pollution, water quality, increased runoff and accretion, and increased flooding in downstream areas.

Dissenting Opinions

The dissent, delivered by Justice Stevens and joined by Justice Souter, Justice Ginsburg, and Justice Breyer, focused on the contention that the Corps' decision to include wetlands within "water of the United States" was an "example of the [Executive branch's] reasonable interpretation of a statutory provision."[41] The Corps' jurisdiction was sufficiently limited by the requirement that the wetland must have a significant nexus to the watershed's water quality.[42]

The dissent expressed disagreement with the idea that the costs of preserving the wetlands were extraordinarily high. The dissenting Justices argued that the benefits wetlands provide far outweigh any costs associated with getting a wetland permit and took the plurality to task for failing to discuss these. Such benefits include "floodpeak reduction, shoreline protection, ground water recharge, trapping of suspended sediment, filtering of toxic pollutants, and protection of fish and wildlife."[43] The two criteria

set forth by the plurality "can only muddy the jurisdictional waters," as the criteria would impose that arbitrary distinctions would need to be made.[44] Additionally, the dissent stated that the plurality opinion did not pay close enough attention to the "fundamental significance" of the CWA.[45] If the purpose of the CWA is to regulate water pollution, then the dissent reasoned that the Corps must have the ability to regulate from the time the pollutant enters the water, regardless of whether or not that entry is into a navigable stream or a man-made ditch, as both can transport pollutants.[46]

While the dissenting Justices agreed with parts of Justice Kennedy's concurring opinion, they disagreed with Kennedy's assertion that the appropriate test would be to determine if the wetland has a significant nexus to navigable waters. The dissent's rationale on this point was that while this would be found true for many wetlands, applying such a test would impose additional work on all parties involved, especially the Corps, which would be forced to make decisions on a case-by-case, or category-by-category, basis. Problems that would arise under such a format include increases in both "the time and resources spent processing permit applications."[47]

## What's Next?

What will happen next is unclear. Since there is a 4-1-4 split in the case, Justice Kennedy's concurring opinion will play an important role in how the statute is interpreted and applied in future cases by lower courts. For some groups, such as the Family Farm Alliance, this could be problematic. Since there is uncertainty over whether those wetlands adjacent to nonnavigable waterways will serve to fulfill the required "significant nexus," it will invite more litigation and dispute.[48] Some environmental groups and lawmakers have revived their attempt to clarify the meaning of the CWA through legislation. The "Clean Water Authority Restoration Act,"[49] introduced in 2005 and which has yet to receive a committee hearing, "would adopt a statutory definition of U.S. waters based on what the Army Corps has used for decades [… and] would remove the word 'navigable' from the Clean Water Act."[50] The Corps has urged wetland regulators to delay making any decisions concerning wetlands that stretch the limit of "traditional navigable waters."[51] Additionally, the Corps has withdrawn its "Philadelphia Ditch Rule," which the Corps used to assert jurisdiction over ditches in the Philadelphia District.[52] At the same time, the EPA issued a memo deferring all "jurisdictional determinations 'that require taking a position on the scope of waters of the United States'" until the agency has a chance to issue official guidelines.[53] It is expected that the Corps and the EPA will jointly issue final guidelines.

1 126 S.Ct. 2208.
2 33 U.S.C. §1251(a).
3 33 U.S.C. §§1311(a), 1342(a).
4 33 U.S.C. §1362(7).
5 33 CFR §§328.3(a).
6 *U.S. v. Rapanos*, 339 F.3d 447 (Mich. 2003).
7 33 U.S.C. §1344.
8 33 CFR §320.4(a) (2004).
9 *Rapanos*, 126 S.Ct. at 2219.
10 *Id*. Note: A map of both the Rapanos and the Carabell property and photographs of the wetlands can be seen at http://www.aswm.org/fwp/rapanos_state2006.htm.
11 *U.S. v. Rapanos*, 376 F.3d 629, 643(Mich. 2004).
12 *Carabell v. U.S. Army Corps of Engineers*, 391 F. 3d 704, 708 (Mich. 2004).
13 474 U.S. 121 (1985).
14 531 U.S. 159, 167 (2001).
15 *Rapanos*, 126 S.Ct. at 2220.
16 *Id*. at 2221.
17 *Id*. at 2222.
18 *Id.*
19 *Id*.
20 *Id.*
21 33 U.S.C. §1362(14).
22 *Rapanos*, 126 S.Ct. at 2224.
23 *Id*. at 2226.
24 *Id.*
25 *Id*. at 2227.
26 *Id.*
27 *Id*. at 2235.
28 *Id*. at 2236.
29 *Id.*
30 *Id.*
31 *Id*. at 2242.
32 *Id.*
33 *Id.* at 2244.
34 *Id*. at 2245.
35 *Id.*
36 *Id.*
37 *Id*. at 2249.
38 *Id*.
39 *Id*. at 2252.
40 *Id*. at 2247-8.
41 *Id*. at 2252.
42 *Id*. at 2258.
43 *Id.* at 2259.
44 *Id.*
45 *Id.* at 2262.
46 *Id.*
47 *Id*. at 2265.
48 David Loos, "Wetlands: Supreme Court Ruling Breathes Life into Clean Water Bill," *E&E Daily*, (June 30, 2006).
49 H.R. 1356, S. 912.
50 David Loos, "Wetlands: Supreme Court Ruling Breathes Life into Clean Water Bill," *E&E Daily*, (June 30, 2006).
51 David Loos, "Wetlands: Agencies Urged to Delay Jurisdiction Calls in Wake of Court Decision," *E&E Daily*, (July 13, 2006).
52 Lucy Kafanov, "Wetlands: Army Corps Re-examining Ditch Regulations," *Greenwire*, (August 7, 2006).
53 David Loos, "Wetlands: Agencies Urged to Delay Jurisdiction Calls in Wake of Court Decision," *E&E Daily*, (July 13, 2006).

## A Nautical Disaster

By Jennifer Montgomery and Beau Braswell

In a way, the toll of the 2005 Atlantic hurricane season can be measured by the number of boats that still remain grounded, wrecked, shattered, or sunk in coastal Louisiana. Several months after Hurricanes Katrina and Rita struck Louisiana, approximately 57,000 recreational boats and vessels remained scattered throughout the state.[1] For several local, state, and federal agencies, the task of recovering vessels has become a tedious process. This article will discuss the undertakings of the U.S. Department of Homeland Security's Federal Emergency Management Agency (FEMA) and U.S. Coast Guard (USCG), the Louisiana Department of Wildlife and Fisheries (LDWF), the Louisiana Sea Grant College Program (LSG), and the Louisiana Department of Environmental Quality (LDEQ).

### FEMA and the USCG

The USCG is currently operating under a mission assignment, delegated to the service by FEMA under the Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)[2], to assist in the removal of vessels, wrecks, and other debris from commercially navigable waterways.[3] Location of a vessel within a navigable waterway is a key issue, but a vessel must also "pose an immediate threat to life, public health, and safety"[4] in order to qualify for USCG removal. USCG salvage personnel assign case numbers to vessels, which for tracking purposes are spray painted on vessels and entered into an electronic database. After a case number is assigned, a determination is made as to whether the vessel meets the requisite removal criteria.[5] Boats that qualify for removal, a total structural loss, have no residual value, and have been substantially destroyed are classified as wrecks. Following classification, wrecks are transported to a U.S. Army Corps of Engineers debris site.[6] Boats that have been damaged, but still retain some residual value, are classified as recoverable vessels.[7] Ideally, recovered vessels are returned to the owners of record. Otherwise, recovered vessels are transferred from the USCG to the LDEQ. In most cases, vessels relinquished to the State are abandoned for an extended period and unclaimed by the owners. Therefore, it is unlikely that owners would attempt to get a vessel back from LDEQ. However, owners can reclaim a vessel transferred to the LDEQ, but they must reimburse for various redemption fees[8] and storage fees.[9]

Vessel owners work with the USCG to determine the classification of their boats. Unfortunately, not every vessel initially marked with a USCG case number qualifies for removal. For example, a boat stranded in a non-commercial waterway may not meet the designated mission criteria. Thus, the USCG would not facilitate removal of the vessel. In order to determine whether a particular vessel qualifies for removal, owners may contact the Coast Guard Wreck and Salvage Group.[10] Concerned vessel owners are required to fill out a questionnaire[11] and are urged to know their spray painted case number, if applicable, before calling.[12] Vessel owners are encouraged to use all available means to recover their vessels because "their property…is still their responsibility".[13] However, under the Stafford Act, owners are only required to reimburse FEMA for the costs incurred by the USCG to the extent that salvage is covered by insurance.[14]

If a boat does not qualify for removal, insurance proceeds are insufficient, and the owner cannot afford the cost of salvage, some commercial boat owners may qualify for a federally subsidized disaster loan[15] from the U.S. Small Business Association (SBA).[16] The SBA offers low interest, fixed-rate loans to disaster victims. Three kinds of loans are available: (1) physical disaster home loans, (2) physical disaster business loans, and (3) economic injury loans. Thus, the SBA does provide loans to people who are not business owners. For example, homeowners, renters, and/or personal property owners may apply for personal property loans or real property loans. Though five filing extensions were granted, the deadline to apply for loans for physical damages caused by Hurricane Katrina passed on May 29, 2006.[17] Likewise, the SBA continued to accept applications for Katrina-related economic injury loans through July 26, 2006.[18]

### Louisiana Department of Wildlife and Fisheries

The LDWF is working with the USCG Documentation Office to assist owners in the recovery of lost vessels. Boat owners can search for missing vessels using the *LDWF Missing Boat Lookup*.[19] Furthermore, the LDWF is helping vessel owners and their insurance companies gather documentation required to file and process claims for property (i.e., vessel) loss. The

LDWF provides, free of charge, certified letters of ownership and will also cancel registration records for lost, stolen, or missing boats once the appropriate documentation has been received.[20] The LDWF is also taking steps to prevent fraudulent registration of boats that may have been lost in Hurricanes Katrina and Rita by scrutinizing ownership documentation for new registration applications.[21] The LDWF prohibited registration of salvaged, found, or abandoned boats and is working with the Louisiana Office of the Attorney General to protect the rights of vessel owners. [22]

LSG Marine Travelift™ Project

USCG salvage contractors use large cranes to remove vessels from the water. Following removal, vessels are transported to staging areas and placed on blocks. However, since the USCG is only responsible for moving boats in order to clear waterways,[23] owners bear the burden of repairing and re-floating boats placed in staging areas. Many fishermen repaired their boats and hired private crane operators to return the vessels to the water. Other fishermen repaired their vessels, but lacked the financial resources needed to negotiate with crane operators. This scenario created a vicious cycle for commercial fishermen because fishing is their primary source of income. Fortunately, the City and Port of Valdez, Alaska, donated a Marine Travelift™ to the Plaquemines Parish government in January 2006. Working together, LSG Extension Agent Albert "Rusty" Gaudé, the Washington and Alaska Sea Grant College Programs, FEMA, the Pacific Coast Congress of Harbormasters (PCCH), and Valdez Port Director Alan Sorum proposed the idea of donating a surplus Travelift™ that was owned and operated by the Port and City of Valdez.[24] Other organizations involved in the acquisition included the LDWF and the Louisiana Seafood Promotion and Marketing Board.[25] The Alaska Fishing Industry Relief Mission (AFIRM), PCCH, and Alaska Sea Grant contributed funding for the Travelift's transportation to Louisiana.[26] A Travelift™ is a wheeled, motorized vehicle comprised of metal beams that form an open square. Because the square is open, operators can straddle and lift a vessel with the vehicle. Once the Travelift™ is in place, four straps are extended underneath a vessel. After a boat is lifted, it can then be wheeled to a boat slip where it may be lowered into the water.

The donated Marine Travelift™ weighs 16 tons and can lift up to 60 tons.[27] In order to operate safely, the lift must be wheeled over solid ground. The Empire Shipyard, located in Plaquemines Parish, was considered an ideal place to use the lift due to the large concrete area located along the slip. The Marine Travelift™ was taken apart in Alaska, shipped 4,500 miles, and then reassembled in Louisiana.[28] Valdez's Travelift™ moved the first Louisiana boat back into the water in March 2006 and has since become essential to rebuilding the economy of Plaquemines Parish. The fishing industry in Louisiana provides jobs for 31,400 people; of those, 15,000 are commercial fishermen.[29] Plaquemines Parish is home to many commercial fishermen and numerous seafood processing plants. Estimates indicate that the around 85 percent of the total number of commercial fishing vessels in the Plaquemines area were damaged by Hurricane Katrina.[30] According to Mr. Gaudé, the Travelift™ has been operating on a daily basis at the Empire Shipyard by blocking, repositioning, and re-floating vessels that have undergone repairs.[31]

An additional Travelift™ was donated by ARAMCO Oil Company, through the combined efforts of Mr. Gaudé, FEMA liaisons Wayne and Nancy Weikel, and the Louisiana Department of Economic Development.[32] After completion of a new boat slip in Empire Harbor, the Travelift™ will be used to further assist in the recovery of the fishery harvest sector. However, the additional Travelift™ will require repairs before use, and Wayne and Nancy Weikel helped secure resources to cover the cost of repair.[33] Eventually, the second Travelift™ may be relocated to Venice, which is southeast of Empire.[34] Venice has never had a public slip with this ability; therefore, for the first time in history, nearly all of Plaquemines Parish would be equipped with vessel lifting and positioning capabilities. As a result, the recovery of the commercial fishing industry, of the lower Mississippi River and its surrounding estuary, will be accelerated.

Louisiana Department of Environmental Quality

The LDEQ is working in conjunction with the LDWF and the Louisiana State Police to recover boats and trailers left on public property in the wake of Hurricanes Katrina and Rita. Boats located on public property are tagged with a notice of abandonment. However, no further action is taken until at least three days after a notice of abandonment is posted on a vessel.[35] On June 19, 2006, a contractor hired by the State, DRC Inc., began towing tagged boats to various staging areas.[36] Towing procedures are governed by the Louisiana Towing and Storage Act[37] and corresponding provisions of the Louisiana Administrative Code.[38] Discernable vessel identification numbers are entered into a computer database.[39] By querying the identification numbers

via a database search, the identification of an owner of record may be ascertained. If a search is successful, the LDWF sends a certified letter to the record owner's last known mailing address. Boats are held for 30 days after the letter is sent, during which time vessel owners may reclaim their boats.[40] Before tagged vessels are towed, legal owners may remove their vessel from private property. If an owner does not have the means to move a particular vessel, State contractors are only authorized to lift and relocate it to an area within 100 feet of the tagged location.[41] However, before a boat is relocated, the contractor must first collect redemption fees[42] from the legal owner.[43] In order to reclaim a boat that has been towed, owners must pay all fees associated with the recovery, towing, and storage of the boat.[44] Redemption fees vary based on the size of the boat.[45] Payments are made directly to the contractor who recovered the boat.[46] Contractors are responsible for returning collected money to the LDEQ, which forwards payments to FEMA.[47] Unclaimed boats will be crushed, scrapped, or auctioned, depending upon condition and value.[48]

FEMA regulations, which ultimately govern the LDEQ's operations concerning vessel salvage, do not consider the income of vessel owners. Generally, insurance will cover redemption fees, but those with inadequate or nonexistent insurance must pay the fees on their own. It is uncertain what will be done for boat owners who would like to reclaim their boats but are unable to pay the associated fees because the situation has yet to arise. One option for uninsured owners is to sign the boat over to someone who can pay the cost of recovery and make arrangements for repayment. Another option includes waiting until the boat is auctioned and attempting to buy it back at that time.

Vessel cleanup is a time consuming and laborious task. The difficult nature of salvage work is illustrated by the removal of the Ocean Queen, a 60-foot mud-filled shrimp boat located at the bottom of a canal in the town of Empire. Raising and draining the boat required an 18-person crew, two cranes, and a day and a half of work.[49] Vessel salvage is also a costly process. Salvage for a commercial vessel can cost between $5,000 and $50,000 and for boats as small as sailboats around $2,000.[50] At least one lawsuit has stemmed from the cost of vessel recovery operations. Thirty boat owners and their insurance companies filed suit, alleging that they were charged up to three times more than normal for the cost of salvage.[51] The plaintiffs initially obtained a default judgment [52] against Marine Recovery & Salvage LLC, but that judgment was recently set aside after taking several factors into consideration. Most importantly, the court found that the defendant's failure to answer the complaint was not willful.[53] The defendant also acted quickly, within two days of entry of default, to cure his default. The court also took into consideration the fact that the defendants asserted several potential meritorious claims.[54]

The aftermath of Hurricanes Katrina and Rita has resulted in the largest coordinated salvage operation in the history of the United States.[55] Fortunately for the residents affected by these storms, operations are nearly complete. The USCG has all but finished its salvage operations, having only about 10 cases that remain open.[56] Initially, the LDEQ contractor estimated that they would be finished towing in 120-150 days.[57] Though many boats will not meet the removal requirements for the USCG or the LDEQ, completion of vessel salvage operations will remain a large step on the road to recovery for coastal Louisiana.

1 Vehicle Retrieval, Hauling, Storage and Security Solicitation for bids #2207210, p. 13 [hereinafter *Solicitation for Bids*].
2 42 U.S.C. § 5121 et seq. Pursuant to the Stafford Act, the federal government is authorized to provide federal natural disaster aid to state and local governments for the health and welfare of their citizens.
3 FEMA, *Coast Guard Assists Louisiana in Vessel Removal*, http://www.fema.gov.news/newsrelease.fema?id=21400 (Dec. 13, 2005) [hereinafter *Coast Guard Assists*].
4 USCG, *Coast Guard Continues FEMA Vessel Removal Operations in Louisiana*, http://www.dbpublicaffairs.com/go/doc/425/104230/ (Jan. 23, 2006). [hereinafter *Coast Guard Continues*].
5 *Id.*
6 *Coast Guard Assists, supra.*
7 *Id.*
8 See the LDEQ section below for further information.
9 Telephone Interview with John Rogers, Environmental Scientist, LA Dept of Environmental Quality (June 17, 2006).
10 The group may be contacted at (409) 682-4289 or (504) 310-3701.
11 Sample at: http://www.laseagrant.org/hurricane/docs/USCG_ContactQuestionnaire.pdf.
12 *Coast Guard Continues, supra*.
13 *Id.*
14 *See* 42 U.S.C. § 5155.
15 *See* 13 C.F.R. § 123 (2006). (Small Business Association Disaster Loan Program).
16 Small Business Association, *Disaster Assistance*, http://www.sba.gov/disaster_recov/index.html (accessed June 28, 2006).
17 Small Business Association, *Hurricane Katrina Disaster Information: Louisiana Amendment*

*5 - Extend Filing Period*, http://www.sba.gov/disaster_recov/katrinafactsheets.html (accessed August 17, 2006).
[18] *Id.*
[19] *See* Louisiana Department of Wildlife and Fisheries, *Missing Boat Lookup*, at http://www.wlf.state.la.us/boating/missingboat/.
[20] Louisiana Sea Grant, *LDWF to Offer Free Assistance to Boat Owners Needing Documentation for Losses Associated with Hurricanes*, http://www.laseagrant.org/comm/2005/boats.htm (Oct. 5, 2005).
[21] *Id.*
[22] *Id.*
[23] Albert 'Rusty' Gaudé, Associate Area Agent (Fisheries), Louisiana Sea Grant College Program and the LSU AgCenter, *Traveling Lift Goes the Distance to Get LA. Boats Back in Water, available at* LSU AgCenter, *Cleaning Up*, http://www.lsuagcenter.com/en/family_home/hazards_and_threats/recovery_assistance/cleaning_up/Travel+Lift+Goes+Distance+To+Get+La+Boats+Back+In+Water.htm.
[24] Louisiana Sea Grant, *Hurricane Recovery Efforts Aided by Alaska*, at http://www.laseagrant.org/comm/2006/travelift.htm (Mar. 8, 2006) [hereinafter Aided by Alaska].
[25] *Id.*
[26] *Id.*
[27] Emily Kern, *Alaskan town answers La.'s SOS*, The Advocate (Mar. 14, 2006), *available at* http://www.2theadvocate.com/news/2458612.html?showAll=y.
[28] *Aided by Alaska, supra.*
[29] Louisiana Seafood Board (LSU Ag Center, Jefferson), *Fascinating Facts: Louisiana's Commercial Fisheries*.
[30] Kern, *supra*.
[31] Email from Agent Albert "Rusty" Gaudé, Associate Area Agent (Fisheries) Statewide LA SeaGrant/LSU AgCenter, to Jennifer Montgomery, Law Clerk, Louisiana Sea Grant Legal Program, *Marine Travelift* (June 30, 2006) [hereinafter *Marine Travelift*].
[32] *Marine Travelift, supra*.
[33] *Id.*
[34] *Id.*
[35] E-mail from John Rogers, Environmental Scientist, Louisiana Department of Environmental Quality, to Jennifer Montgomery, Law Clerk, Louisiana Sea Grant Legal Program, *Another Boat Question*, (May 31, 2006) [hereinafter *Another Boat Question*].
[36] Louisiana Department of Environmental Quality, *Contractor to begin towing vehicles, boats*, http://www.deq.louisiana.gov/portal/portals/0/news/pdf/towingjune15.doc (June 16, 2006) [hereinafter *Contractor to begin*].
[37] La. Rev. Stat. Title 32 ; Chapter 16.
[38] LA. ADMIN. CODE tit. 55; Chapter 19.
[39] *Contractor to begin, supra*.
[40] *Another Boat Question, supra*.
[41] *Solicitation for bids, supra* at 26.
[42] In this case, redemption fees would be calculated by considering towing and lifting costs incurred by the contractor.
[43] *Id.*
[44] *Id.* at 20.
[45] *Id*.
[46] *Solicitation for bids, supra* at 20.
[47] *Id.*
[48] *Another Boat Question, supra*.
[49] Matthew Brown, *It's Slow Sailing for Boat Salvage*, The Times-Picayune (Oct. 13, 2005), *available at* http://www.nola.com/katrina/pages/103105/A01.pdf.
[50] *Id.*
[51] *James Kelly Lambert v. Board of Commissioners of the Orleans Levee District*, 2006 WL 1581262, (E.D.La.) June 07, 2006.
[52] Definition of "default judgment": A judgment entered against a defendant who has failed to plead or otherwise defend against the plaintiff's claim. See "Black's Law Dictionary (8th ed. 2004).
[53] *Id* at 3.
[54] *Id.*
[55] National Oceanic and Atmospheric Administration, *Office of Coast Survey*, http://chartmaker.ncd.noaa.gov/ocs/hsrp/archive/jan2006/NOAA_Panel_25_Jan.pdf (June 26, 2006).
[56] Telephone Interview with USCG Wreck and Salvage Group (September 7, 2006).
[57] *Contractor to begin, supra.*

## Regional Research Plan to Determine Priority Topics

Spread out along 1,631 miles of coastline, scientists studying the Gulf of Mexico are interested in similar topics: seafood safety, fisheries, wetlands restoration and the balance between conservation and development. Yet many are unfamiliar or unaware of complimentary research being conducted in neighboring states. Now, one effort will bring them and other stakeholders together to plan and coordinate marine research in the Gulf region.

*Planning, Prioritizing, and Implementing Gulf of Mexico (GOM) Regional Marine Research and Information Needs* begins this summer and will continue through 2011. By the end of 2008, a strategic research plan will be completed. Plan implementation will begin in 2009.

With a $600,000 grant, the four Sea Grant College programs along the Gulf (Louisiana, Texas, Mississippi-Alabama and Florida) are spearheading this effort to create the regional research and information plan. The majority of the funding is coming from the National Sea Grant Office, a federal government-university partnership program under the umbrella of the National Oceanic and Atmospheric Administration (NOAA).

The four Sea Grant programs will work with state and federal agencies, non-profits and private industry along the Gulf to prioritize research and information needs and implement a strategic plan. They also will consider ways to leverage their financial resources and in-house assets to provide the most impact in the top-priority areas. Research agencies along Mexico's Gulf coast also are expected to participate "A regional research plan will help bring groups together to identify and prioritize needs and build collaborative funding agreements," said LaDon Swann, director of the Mississippi-Alabama Sea Grant Consortium.

Regional cooperation was highlighted in the U.S. Commission on Ocean Policy's report, and a GOM regional research plan is in line with the commission's recommendation that federal agencies dealing with ocean and coastal issues improve coordination and use their funding to focus on regional priorities.

"By providing a Gulf-wide research agenda in support of the Gulf of Mexico Alliance, led by the governors of five Gulf states, the Gulf of Mexico Research Plan will enhance ongoing efforts such as the federal Ocean Research Priority Plan," Swann said. "The plan also will help eliminate overlapping research efforts."

The goal of a Gulf research plan and implementation strategy will also directly address and complement the Governors' Action Plan. Through this plan all five Gulf of Mexico governors have formally adopted the objectives of improving water quality, conserving and restoring wetlands, expanding environmental education, improving habitat characterization and reducing nutrient inputs, all clearly benefiting from coordination and direction of the Gulf's many research initiatives. Jim Cato, director of Florida Sea Grant, said he expects that hundreds of stakeholders will be involved in determining the highest-priority issues in the Gulf. Cato added the plan is important because of the high level of concern for the economic and environmental sustainability of the Gulf of Mexico.

"There are a huge number of research issues in the Gulf of Mexico, and each state has all different groups working on them," Cato said. "So, it will be good to organize the issues into designated priorities against which everyone can use their limited resources and collectively work on the most important problems."

Margaret Davidson, co-leader of the Gulf of Mexico Alliance and director of the NOAA Coastal Services Center, said the plan will focus on the same priorities that were revealed under the Ocean Action Plan. It will help stakeholders "look at the same ensemble of priorities and customize them for the unique scientific and political challenges in the region," she said.

## Federal Plan for Endangered Sawfish

The Smalltooth Sawfish Recovery Team, convened by NOAA Fisheries and comprising of sawfish scientists, managers and environmental managers, has released a plan to help recover the U.S. Distinct Population Segment (DPS) of smalltooth sawfish (*Pristis pectinata*). Some scientists believe this to be one of the most critically endangered fish species in America; it has been designated as endangered under the Endangered Species Act since 2003. The plan is intended to reduce the number smalltooth sawfish accidentally caught in commercial fishing nets and lines, as well as protect coastal habitats. The recovery plan also provides recommendations intended to

guide federal fishery managers as they set rules for the different fisheries in the southeastern United States. To see the full plan, visit http://www.nmfs.noaa.gov/pr/.

The plan calls for research on where sawfish are being incidentally caught and on what types of gear. It calls for fishing boats to carry modified gear that would minimize captures of sawfish and to carry equipment to release any that are caught. It also calls for better education of commercial and recreational fishermen. To protect the habitat of juvenile sawfish, the plan would require other agencies to consult with the National Marine Fisheries Service (NMFS) before approving developments that affect the important mangrove and other heavily vegetated coastal habitats.

Sawfish, like sharks, skates and rays, belong to a class of fish called elasmobranchs, whose skeletons are made of cartilage. Sawfish are actually modified rays with a shark-like body and gill slits on their ventral side. Smalltooth sawfish are the only domestic marine fish and the only elasmobranch listed under the ESA. Worldwide, all seven species of sawfish are listed by the World Conservation Union as critically endangered.

Sawfish species inhabit shallow coastal waters of tropical seas and estuaries throughout the world. They are usually found in shallow waters close to shore, over muddy and sandy bottoms. They are often found in sheltered bays, on shallow banks and in estuaries or river mouths. Certain species of sawfish are known to ascend inland in large river systems.

Smalltooth sawfish have been reported in the Pacific and Atlantic oceans and Gulf of Mexico; however, the U.S. population is found only in the Atlantic Ocean and Gulf of Mexico. Historically, the U.S. population was common throughout the Gulf of Mexico from Texas to Florida, and along the east coast from Florida to Cape Hatteras. The current range of this species has contracted to peninsular Florida, and smalltooth sawfish are relatively common only in the Everglades region at the southern tip of the state. No accurate estimates of abundance trends over time are available for this species. However, available records, including museum records and observations from fishermen, indicate that this species was once common throughout its historic range; in places it was once so abundant it was considered a nuisance. Populations of smalltooth sawfish have unquestionably declined dramatically in U.S. waters over the last century.

While there is little reliable data available for this species and no robust estimates of historic or current population size exist, available data indicates that the species' distribution has been reduced by about 90 percent, and that the population numbers have declined dramatically, perhaps by 95 percent or more. Sawfish are extremely vulnerable to overexploitation because of their propensity for entanglement in nets, their restricted habitat and low rate of population growth. The decline in smalltooth sawfish abundance has been caused primarily by bycatch in various fisheries, especially in gill nets. Because adults can grow large, potentially damage fishing gear or even pose a threat to fishermen, many incidentally captured sawfish were killed before they were removed from fishing gear, even if fishermen had no interest in keeping them.

Juvenile sawfish use shallow habitats with a lot of vegetation, such as mangrove forests, as nursery areas. Many such habitats have been modified or lost due to development of the waterfront in Florida and other southeastern states. The loss of juvenile habitat has likely contributed to the decline of this species.

Under the Endangered Species Act, it is illegal to catch or harm an endangered sawfish. However, some fishermen catch sawfish incidentally while fishing for other species.

NMFS and the Smalltooth Sawfish Recovery Team have developed guidelines for fishermen that inform them on how to safely handle and release any sawfish they catch. Some states have taken additional steps to protect this species; the states of Florida, Louisiana and Texas have prohibited the "take" of sawfish. Florida's existing ban on the use of gill nets in state waters is another conservation tool. Three National Wildlife Refuges in Florida also protect their habitat.

The IUCN Red List also lists the smalltooth sawfish as endangered. The smalltooth sawfish was added to the candidate species list in 1991, removed in 1997 and placed back on the list again in 1999. In November 1999, NMFS received a petition from the Ocean Conservancy (formerly the Center for Marine Conservation) requesting that this species be listed as endangered under ESA. On April 1, 2003, NMFS announced its final determination to list smalltooth sawfish as an endangered species under the Endangered Species Act.

Comments on the recovery plan may be sent by fax, e-mail or mail to:

- smalltoothsawfish.recovery-plan@noaa.gov, include in the subject line the following document identifier: Smalltooth Sawfish Recovery Plan.
- Smalltooth Sawfish Coordinator, NOAA Fisheries Service, Southeast Regional Office, Protected Resources Division, 263 13th Avenue South, St. Petersburg, FL 33701
- or, fax: (727) 824-5309.

## Announcements

### Information Sheets Help with Navigation of FEMA Regulations

The Louisiana Sea Grant Legal Program has developed a series of information sheets to help those affected by hurricanes Katrina and Rita navigate FEMA programs and related legal issues during the rebuilding process. The information sheets are available at parish offices throughout south Louisiana and also online at http://www.lsu.edu/sglegal.

"This project came about after our extension program partners in the LSU AgCenter identified a need for a plainer explanation of FEMA reconstruction guidelines," said LSG Legal Project Director Jim Wilkins. "In many instances, specialized federal programs and documents are not only difficult for the general population to understand but also for many local authorities who've never extensively dealt with a particular program before."

The information sheets answer questions about where and how to rebuild, Louisiana's building codes, the National Flood Insurance Program and other reconstruction matters. Complimenting the information sheets is a series of narrated PowerPoint presentations, also available for download from the Sea Grant Legal Web site.

"These documents will play a critical role in helping people make rebuilding decisions," said Dr. Rod Emmer, Executive Director of the Louisiana Floodplain Management Association. "Homeowners must understand the basics of these programs and then they will be better prepared to determine if they qualify for them. The increased cost of compliance is one such program that offers a way to better protect lives and property."

### LCL Email Update Service

The Louisiana Sea Grant Legal Program disseminates an email/web-based update to our biannual newsletter four times per year. These updates cover environmental law news relevant to the LCL's audience, summaries of recently introduced environmental legislation and regulations and recent court decisions. To subscribe to the LCL Email Update Service, send an email to lisas@lsu.edu.

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Sea Grant LOUISIANA

**Louisiana State University**
**Sea Grant College Program**
**Sea Grant Legal Program**
**227B Sea Grant Bldg.**
**Baton Rouge, LA 70803-7507**

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