

LOUISIANA COASTAL LAW

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Into the Abyss of Louisiana's Gulfward Boundary

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I. Introduction

Until 1937, it was uncontested that the states' owned all submerged lands adjacent to their respective shorelines, and Congress acknowledged Louisiana's gulfward boundary was "to the Gulf of Mexico . . . including all islands within three *leagues* of the coast."¹ Prior to 1937, applications for offshore mineral leases, filed under the Federal Mineral Leasing Act of 1920, were rejected by the federal government and directed back to coastal states due to an assumed lack of federal jurisdiction. However, in 1937 the federal government changed its position on the jurisdiction of offshore waters and began filing applications that were previously rejected. Congress introduced "[a] bill to assert federal jurisdiction over submerged lands" adjacent to the states' shorelines.² The bill eventually failed but the federal actions "signaled the beginning of a movement to change federal submerged lands policy."³ The realization that there were vast amounts of offshore oil and natural gas and the potential for substantial revenue from these resources created the atmosphere for a jurisdictional battleground that would become known as the tidelands controversy.⁴

"Tidelands" in a legal sense are only areas of land over which the ebbs and flows of the tides extend, but the term "tidelands" was adopted by reporters and thus the public to broadly encompass all of the submerged lands adjacent to shorelines and submerged lands that might be subject to tidal overflow.^{5,6} While the tidelands eventually

became the focus of the dispute, initially the states were concerned with the title to all of their lands under navigable waters.⁷ The longstanding precedents of the United States Supreme Court, federal courts, and state courts created the property rule "that the several states had title to lands beneath ALL navigable waters within their respective boundaries by virtue of their inherent sovereignty."⁸

In 1945, the tidelands controversy issue finally landed in court when the federal government filed a trespass complaint against the State of California for granting mineral leases in areas over which the federal government asserted jurisdiction.⁹ In *United States v. California*, the Court held against the State of California, finding that "the federal government had jurisdiction over the submerged lands adjacent to California's shoreline."¹⁰ The Court refused to extend its earlier precedent, and the decision effectively limited the Court's holding in *Pollard's Lessee v. Hagan* and its progeny, which had held that the states had title to all of the lands beneath navigable

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waters within their boundaries by way of the equal footing doctrine.¹¹ The decision set the stage for what would be a long-fought legal battle between the states and the federal government for the rights to the submerged lands under navigable waters adjacent to state boundaries.

II. History of Louisiana's Gulfward Boundary

A. *Louisiana I*

In 1948, the tidelands issue came to Louisiana when the federal government filed a complaint in the United States Supreme Court, similar to the claim filed against California, seeking to declare ownership over the submerged lands beyond the ordinary low-water mark off the coast of Louisiana and extending into the Gulf of Mexico.¹² In *United States v. Louisiana* ("*Louisiana I*"),¹³ the federal government alleged they were the owner of the lands seaward of Louisiana's coastal low-water mark and that they had "paramount rights in and full dominion and power over the lands, minerals, and other things underlying the Gulf of Mexico . . ." in the area.¹⁴ The Court found that *United States v. California* controlled the case, and held, on the basis of national sovereignty and national defense, that the United States should be granted the relief that it asked for, declaring the United States the rights to the property in question.¹⁵

B. Submerged Lands Act of 1953

In response to *United States v. California*, *Louisiana I*, and the similar decision of *United States v. Texas*,¹⁶ Congress feverishly worked on a legislative compromise to fix what seemed to the states to be an utter injustice. The compromise came when Congress passed the Submerged Lands Act.¹⁷

The Submerged Lands Act granted the states title to the subsoil and submerged lands extending out to three miles adjacent to the states' coastlines.¹⁸ The rights included all of the mineral and natural resource interests in the lands.¹⁹ Further, the states bordering the Gulf of Mexico were given the opportunity for rights up to three marine leagues from their respective shores if the state could prove that it was the intention of its historical sovereign to own and regulate out to three marine leagues.²⁰

The Submerged Lands Act effectively overturned *United States v. California*, *Louisiana I*, and *United States v. Texas*.²¹ However, the Act failed to answer

which states "were entitled to a historical boundary of three marine leagues; and which rules should be used to demarcate the coastlines of the states."²² Fortunately for Louisiana, the Act did consider the ambulatory nature (migration) of coastlines,²³ but the unanswered questions and the ultimate nature of coastlines led to yet more litigation and contention between the states and the federal government.²⁴

C. *Louisiana II*

The Submerged Lands Act left Louisiana in limbo. Even though it asserted ownership out to three marine leagues in the Gulf of Mexico, Louisiana did not know whether that claim would be recognized by the federal government. Conflict between the federal government and Louisiana "erupted over the leasing of submerged lands between three nautical miles and three marine leagues from Louisiana's coast."²⁵ An interim agreement was reached, setting boundaries and zones for leasing, but left exorbitant amounts of money from the minerals in the area in escrow to await a final settlement agreement and ultimately intensifying the dispute.²⁶

In 1957, the dispute landed in the United States Supreme Court, but the issue was so intimately tied to questions raised by the other gulf states that the Court allowed Mississippi, Texas, Florida, and Alabama to intervene in the dispute.²⁷ In *United States v. Louisiana et al. (Louisiana II)*,²⁸ the Supreme Court held that Texas and Florida established their historical boundaries out to three marine leagues, but that Louisiana, Alabama, and Mississippi only established a three-mile boundary.²⁹

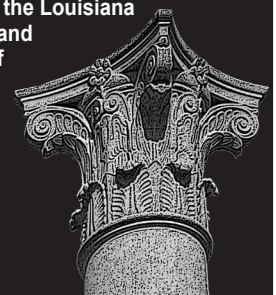
Louisiana's futile argument for a three marine league boundary was based on Congress's Act admitting the state to the Union in 1812.³⁰ Louisiana asserted that the Act described Louisiana's boundary as "including all islands within three leagues of the coast;" therefore, the clause, in conjunction with pre-admission history, "should

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be read to mean Congress fixed the State's seaward boundary [at] a line three leagues from its coast."³¹ The Court, however, found that the federal government's argument was more compelling.³² The Court held that the Act only gave Louisiana the rights to the islands – and not the waters – within the three-league territory.³³

Louisiana also tried to claim that at “the time of its admission, the United States was claiming three leagues of territorial waters in the Gulf, and that the Act of Admission was framed with reference to that claim.”³⁴ The Court readily dismissed this argument as well, stating that the rule regarding whether countries were allowed to assert claims over waters surrounding their borders varied greatly among nations and had never been adopted by the United States.³⁵

The Court then easily dismissed Louisiana's further reliance on post-admission events to bolster its argument, stating that “[u]nder the Submerged Lands Act, Louisiana's boundary must [have been] measured at the time of her admission.”³⁶ Therefore, the Court held that “Louisiana [was] entitled to submerged-land rights to a distance no greater than three geographical miles from its coastlines, wherever those lines may ultimately be shown to be.”³⁷

D. Louisiana's Coastline

The open-ended decision of *Louisiana II* led to confusion and arguments over the baseline from which Louisiana's ambulatory³⁸ coastline would have its three-mile territorial sea measured.³⁹ Proposals went back and forth between the federal government and Louisiana, but no agreement could be reached.⁴⁰ Therefore, the decision was once again left up to the United States Supreme Court.⁴¹

The Court found “that the principles of the Convention on the Territorial Sea and the Contiguous Zone⁴² [should] be used to determine Louisiana's baseline.”⁴³ Special Master Walter P. Armstrong was appointed by the Court to locate the seaward boundary.⁴⁴ The Special Master “held hearings and collected evidence” that he used to make his finding of the boundary, but his determined boundary ultimately upset both sides.⁴⁵ Nevertheless, objections to the findings were overruled.⁴⁶

Louisiana's coastline was set. The final report establishing the coastline can be found at *United States v. Louisiana et al.*, No. 9 Orig., 422 U.S. 13 (1975). The

Supreme Court stated that the coordinates for the coastline established “supersedes all prior coastline descriptions of former decrees in this case and is the past and present coastline and shall constitute the coastline as of the date of the final decree in this case, [...and it] is to be taken as the same as the present coastline for all relevant times and purposes.”⁴⁷ The parties were then directed to establish the three-mile seaward limit of the state's territorial sea. The Court retained jurisdiction over the matter “to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to [the] previous orders or decrees” in the decision “or to effectuate the rights of the parties in the premises.”⁴⁸

III. Current State of Louisiana's Gulfward Boundary

A. 2011 Legislative Act No. 336 and Federal Preemption

In 2011, the Louisiana State Legislature enacted Act No. 336, which amended and reenacted La. Rev. Stat. Ann. §§ 49:1 and 2 and enacted 49:3.1. The Act reiterated and expounded upon Louisiana's original interpretation of its gulfward boundary. The language of the statutes provides that Louisiana has always, and still does, assert that its historic gulfward boundary extends to three marine leagues and that Louisiana has full sovereignty over waters within this boundary.⁴⁹ Further, the amended statute § 49:2 states that Louisiana shall be entitled to the lands, minerals, and other natural resources out to three marine leagues from its coast.⁵⁰

Louisiana, however, does not have the power to extend its gulfward boundary to three marine leagues in the face of federal preemption of the issue.⁵¹ As the lengthy history of Louisiana's gulfward boundary shows, the United States Supreme Court found that under the 1953 Submerged Lands Act, Louisiana's gulfward boundary was to be set at three *miles*.⁵² The United States Federal Government was granted paramount rights in the gulf waters and the land lying underneath beyond three miles off Louisiana's shore. Therefore, absent new action by Congress, any Louisiana law to the contrary is federally preempted, and Act 336 clearly states that Louisiana's assertion of jurisdiction to three marine leagues is not effective “until the U.S. Congress acknowledges the boundary...” or litigation resulting from the legislation “...is resolved and a final non-appealable judgment is rendered.”⁵³ This indicates that the Louisiana Legislature recognizes that its action was essentially symbolic.

B. Louisiana Wildlife and Fisheries' Action

Because of the 2011 amendments, the Louisiana Wildlife and Fisheries Commission now believes that the Louisiana statutes afford it the power to regulate fisheries resources out to three marine leagues. In the Louisiana Wildlife and Fisheries Commission's minutes from May and June 2012, the commission discussed and passed a motion to implement Louisiana state law out to 10.35 miles.⁵⁴ When asked to explain "implement," Louisiana Department of Wildlife and Fisheries Secretary Robert Barham explained that the Department's Enforcement agents would consider 10.35 miles the boundary of Louisiana's waters.⁵⁵

Commissioner Voisin voiced warranted concern about the implementation.⁵⁶ He stated that he was "for extending the gulfward boundary[,] but [was] concerned about the fishermen who might get caught in the middle by federal enforcement."⁵⁷ Commissioner Voisin wanted more discussion on "what this action would mean for the fishermen who could be caught in the middle."⁵⁸ Commissioner Broussard seemingly dismissed Voisin's concern, stating, "This is currently taking place with no [enforcement of] the TEDs [turtle excluder device]⁵⁹ regulations [by Louisiana authorities] on shrimping vessels, [but] if someone is caught in federal waters without a TED on their vessel they will be cited [by federal authorities], although the state does not enforce that." Secretary Barham went on to say "that the feds can come into state waters to enforce their regulations, so this is exactly the same situation."⁶⁰

Despite the issues affecting the enforcement of TED regulations, it seems that asserting the jurisdiction to regulate fisheries in such a large geographical area is on a completely different level. Commissioner Voisin even noted that "extending the state boundary by seven miles is different than [not enforcing] a TED regulation, and the enforcement in that area will create confusion and unintended consequences."⁶¹

In the next meeting regarding the issue, Commissioner Voisin asked whether the Commission was prepared to defend "someone who may get caught in the middle, fishing in what [Louisiana Wildlife and Fisheries] considers state waters, but the feds recognize as federal waters, or if someone could take action against the Department if they were to get caught."⁶² Nevertheless, his comments were overlooked, and Secretary Barham

stated "that [it] will probably not be an issue [because they were] implementing the clearly expressed will of the people of Louisiana as expressed by the Legislature and the Governor."⁶³ Further, Commissioner Broussard stated that there was precedent for the matter because "there were federal tickets written [the year prior] for TED violations . . . and there were no far-reaching repercussions."⁶⁴

What the Commission may not have considered is that the TED incidents occurred under different circumstances. For the TED violations, the Louisiana Wildlife and Fisheries merely turned a blind eye at vessels lacking federally required TEDs, and some of those vessels incidentally received citations by the federal government. However, Louisiana Wildlife and Fisheries had never told the owners of the vessels that it was all right to not have TEDs. They merely did not enforce the federal regulations. Here, the Commission planned on sending press releases and publications "as rapidly as information is put out"⁶⁵ to inform the public that Louisiana's gulfward boundary is now three marine leagues rather than three miles. This is an affirmative and aggressive action. Unlike the TED incidents where Louisiana Wildlife and Fisheries may not have enforced regulations to the fullest extent, here the Commission and Louisiana Wildlife and Fisheries are proactively causing the public to believe they only need to abide by Louisiana laws out to three marine leagues and can ignore federal laws. Vast implications could arise from the present scenario. Given the uncertainty of the future, it is important to take a look at how the federal government may respond to the state regarding this contentious matter.

C. Regional Management in Connection with the Gulfward Boundary

Louisiana's assertion of an extended gulfward boundary has come at the same time that the Louisiana Wildlife and Fisheries is pushing the Gulf of Mexico Fisheries Management Council (Council) to conduct a regional fisheries management study.⁶⁶ This move is in response to much dissatisfaction with how the Council has been managing the Red Snapper fishery in the Gulf of Mexico with severely restricted recreational bag limits Gulf wide. Regional management is defined as "the regional control of recreational possession and landing within some areas of jurisdiction."⁶⁷

A regional management study of the red snapper fishery, for example, allows for the state to monitor the

“seven locations where 75 to 95 percent of recreational red snapper are landed.”⁶⁸ Fishermen and for-hire vessels would be permitted to participate in the study.⁶⁹ Those fishermen that obtained a permit would “be allowed to harvest in state or federal waters under regional management regulations.”⁷⁰ Based on the local Louisiana monitoring program, the data “would be used to determine when the Louisiana regional allocation has been met and the season should be closed.”⁷¹ However, “size limits would continue to be set” by the Council.⁷²

Under the regional management plan, Louisiana is requesting that the Council “establish an annual recreational landing allocation for Louisiana” and “allow Louisiana’s permitted recreational fishermen and for-hire vessels to harvest in the [Exclusive Economic Zone]⁷³ under regional management regulations.”⁷⁴ An example of the effect of regional management is explained as such: “If the federal and state regulations differ, [with] for example a continuously open season versus weekend-only openings, participants in Louisiana’s regional program would be subject to the state regulations even if fishing in federal waters.”⁷⁵

After initial discussions of the regional management plan, the Council expressed concerns over regional management and how it was being pushed in conjunction with Louisiana’s assertion of a three marine league gulfward boundary and fisheries management jurisdiction within that boundary.⁷⁶ However, Mr. Riechers from the Council stated that he thought that regional management “is a different issue though it obviously is intertwined in some respects, but [the gulfward boundary] is a different issue dealing with [Louisiana’s] boundary shift.”⁷⁷

Louisiana pushed to be noncompliant with the present federal red snapper regulations, both in terms of the boundary and in terms of the 2013 red snapper season open fishing dates and daily catch limits.⁷⁸ The Council set a red snapper season that was non-compliant with federal regulations with respect to both catch limits and boundaries. In response, the National Marine Fisheries Service passed an emergency rule that allowed the Southeast Regional Office Director the ability to close federal waters off states with seasons inside their state waters that do not comply with federal regulations.⁷⁹ Consequently, Louisiana joined with Texas, another non-compliant state, and filed suit in federal district court to invalidate the emergency regulation.⁸⁰ The district court held that the emergency regulation was

not promulgated in accordance with established law, was contrary to statutory provisions, and was adopted without observance of the procedure required by law. Therefore, the emergency regulation was invalidated.⁸¹

IV. Past Federal Actions Taken When States Refused to Comply with a Federally Preempted Matter

The Magnuson Fishery Conservation and Management Act (Magnuson Act) gives the “United States [. . .] sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the Exclusive Economic Zone.”⁸² The Exclusive Economic Zone (EEZ) encompasses 200 nautical miles from the nation’s baseline, which is essentially the coastline.⁸³ The Magnuson Act reserves state jurisdiction over fisheries management within the state territorial waters portion of the EEZ except when it is determined that state actions are adversely affecting a federal fishery management plan in the EEZ. In that case, the federal government can regulate the fishery within the state’s territorial sea thereby preempting state law.⁸⁴

A. Administrative Procedure in Title 50 of the Federal Register

Through the authority of 16 U.S.C. § 1856 (b), which allows a state to request a hearing to contest federal preemption of fisheries management in state waters, 50 C.F.R. § 600.605 and § 600.610 were implemented to describe the policies and procedures for the decorum of preemption hearings.⁸⁵ State fisheries management jurisdiction may be federally preempted when a state has taken any action or failed to take any action that results in fishing that substantially adversely affects a federal fishery management plan if the fishing in the fishery is conducted predominately within the EEZ and beyond.⁸⁶

The present situation fits squarely within the parameters of the regulation’s requirement for a federally preempted matter. The Magnuson Act’s provisions for federal preemption of state fisheries jurisdiction seems to contemplate actions within the state’s territorial waters. It would seem to apply with even greater force if a state seeks to extend those actions into federal waters of the EEZ. The Louisiana Wildlife and Fisheries’ decision to regulate fisheries past the three-mile boundary will cause fishing that is not in compliance with federal regulations in an area that has been deemed the EEZ of the federal government⁸⁷ and could cause substantial

adverse effects upon the federal government's ability to regulate the fishery.

In that case, it is likely that a federal Administrative Law Judge after a hearing would find that the Louisiana Wildlife and Fisheries' attempt to regulate fisheries beyond the three-mile limit is federally preempted. The Secretary of Commerce⁸⁸ is likely to accept the findings and will then notify the Attorney General of the state and the appropriate council(s) in writing of the decision that the matter is preempted.⁸⁹ Further, he "will also direct the Administrator⁹⁰ to promulgate appropriate regulations proposed under § 600.615(d) and otherwise *to begin regulating the fishery within the state's boundaries* (other than its internal waters)."⁹¹

B. *Bateman v. Gardner*

In 1989, the court in *Bateman v. Gardner* held that the Magnuson Act and the Gulf of Mexico Shrimp Fishery Management Plan preempted a Florida statute that prohibited state residents from shrimping in a specified area outside of Florida's territorial waters.⁹² The Magnuson Act and the Gulf of Mexico Shrimp Fishery Management Plan prohibited shrimping by all persons in part but not all of the specific area.

The court explained that federal law could preempt state law when it is impossible to comply with both state and federal law, or "when the state law stands as an obstacle to accomplishment of congressional purposes."⁹³ Here, the court also concluded that federal law preempted state law when the state law stands as an obstacle to accomplishment of one of the purposes of the Magnuson act. The court held, and the eleventh circuit affirmed, that Florida was enjoined from enforcing their state law in a manner that conflicted with applicable federal regulations.⁹⁴

C. *Medeiros v. Vincent*

Similarly, although decided before the enactment of the Magnuson Act, under different statutory authority and on different grounds, the background information in the United States Court of Appeals for the First Circuit's decision, *Medeiros v. Vincent*,⁹⁵ shows that a moratorium on fishing is a possible result of failure to comply with the Federal Regulatory fishing scheme.

Medeiros stated that in 1942, through congressional approval, fifteen Atlantic Coast states and the District of Columbia entered an agreement to jointly regulate fisheries within the states' three-mile coastal boundary.⁹⁶ The agreement would be implemented through interstate fishery management plans (IFMPs), and each party to the agreement would be represented on the Atlantic States Marine Fisheries Commission (ASMFC).⁹⁷ "Until 1993, the decision to participate in any IFMP was entirely voluntary,"⁹⁸ however, in response to "spotty" compliance, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act.⁹⁹ The Act allowed the ASMFC to determine "necessary" provisions and to "require that all member states adopt and comply with [the necessary] terms."¹⁰⁰ In the event that a member refused to comply, the Secretary of Commerce would be notified and would make a decision as to whether the IFMP was "necessary" and whether the party was not in compliance.¹⁰¹ If the Secretary found a party was not in compliance with a necessary provision then "a *moratorium on fishing* [could] be imposed in the offending [party's] coastal waters."¹⁰² *Medeiros* shows that a likely consequence for the Louisiana Wildlife and Fisheries' encouraging violation of Federal Regulations in an area that has been determined by the U.S. Supreme Court to be Federal waters is that a moratorium could be placed on all fishing within federal and Louisiana state waters until Louisiana complies with the Federal laws.

D. Federal Preemption of Other Laws

In *Brown v. Board of Education of Topeka, Shawnee County, Kan.*,¹⁰³ the U.S. Supreme Court declared the segregation of schools unlawful in violation of the Equal Protection Clause of the Constitution. Unfortunately, many states refused to implement the decision and continued the practice of segregation.¹⁰⁴ The resistance to implementation led to drastic federal involvement. For example, in the famous stand in the schoolhouse door incident, the Governor of Alabama along with state troopers at his side stood at the entrance of the University of Alabama and refused entrance of two black students.¹⁰⁵ In response to this action, President John F. Kennedy deployed the Alabama National Guard to the school to force the Governor and troopers to allow the students' entrance.¹⁰⁶

While the issues of fisheries regulation are not nearly as dramatic or urgent as the protection of basic human equality, the *Brown* example shows that the

federal government can and has used force to bring about compliance with federal law. Furthermore, while not as severe as the implications that occurred in *Brown*, “force” is what the federal government has begun to use to enforce the three-mile gulfward boundary. Recently, “the acting special agent [Otha Easley] in charge of southeast fisheries enforcement said . . . that ‘the honeymoon period . . . is over.’”¹⁰⁷ Originally, the Coast Guard had just given out warnings to anglers caught in the controversial waters between three miles and three marine leagues.¹⁰⁸ However, in the last weekend of April 2013, the Coast Guard issued citations for six red snapper violations off of the Louisiana coast for “catching red snapper in federal waters ‘out of season.’”¹⁰⁹ The 2013 red snapper season for Louisiana recreational fishermen in federal waters was set for June 1st to June 9th.¹¹⁰

V. The Discretionary Function Statute and Louisiana’s Liability

When Louisiana fishermen are cited for violation of federal law because they were led to believe it no longer applied in the three marine league area, there is a question as to whether the fishermen could sue the state. The state has some immunity when performing discretionary functions, but there is a possibility that the state’s activity of outwardly leading the public to believe it is allowed to follow only state law in the federal waters area might fall outside of this immunity.

The discretionary function statute is a Louisiana statute that provides immunity from liability to “public entities”¹¹¹ or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.”¹¹² However, some acts fall outside of the discretionary function statute’s immunity.¹¹³ The discretionary function statute excludes immunity for actions “when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive.”¹¹⁴

As the background of the current matter shows from the Louisiana Wildlife and Fisheries’ meeting minutes in May and June 2012, Louisiana Wildlife and Fisheries is aware that they are going directly against Federal Regulations and United States Supreme Court decisions, which give directive actions on what con-

stitutes state waters and how the state should regulate fisheries off of its coast. The Submerged Lands Act and the Supreme Court decisions regarding Louisiana’s gulfward boundary direct that Louisiana only has authority over the area extending three miles from its set coastal baseline. Therefore, any actions to the contrary may not fall under discretionary function immunity. Thus, Louisiana Wildlife and Fisheries could incur liability for their actions regarding the area beyond three miles.

VI. Conclusion

The Louisiana Legislature and the Louisiana Wildlife and Fisheries’ attempt to extend the Louisiana gulfward boundary to three marine leagues is a federally preempted matter. As such, their actions are being met with Federal action in the form of citations to anglers fishing in the contested waters out of the federal season, and more Federal consequences such as a moratorium on fishing in the area could be possible. The Louisiana Wildlife and Fisheries actions in leading the public, in particular anglers, to believe that there is no cloud on the state’s assertion of jurisdiction out to three marine leagues will likely not be afforded discretionary function statute immunity because those actions may be viewed as willful misconduct. Therefore, if the actions lead to an individual or a company’s detriment, they could incur liability.



Endnotes:

¹ Gregory Blaine Miller, *Louisiana’s Tidelands Controversy: The United States of America v. State of Louisiana Maritime Boundary Cases*, 38 LOUISIANA HISTORY: THE JOURNAL OF THE LOUISIANA HISTORICAL ASS’N 203, 205 (1997) (quoting William G. McIntire, Marc J. Hershman, Rodney D. Adams, Kai D. Midboe, and Barney B. Barrett, *A Rationale for Determining Louisiana’s Coastal Zone*, 1 COASTAL ZONE MANAGEMENT SERIES (1975)) (emphasis added).

² S. J. RES. 208, 75th Cong. (1937).

³ Miller, *supra* note 1, at 205-06.

⁴ *Id.* at 204.

⁵ See *Pollard’s Lessee v. Hagan*, 44 U.S. 212, 219 (1845), explaining that tidelands are coastal areas above the mean low tide and below the mean high tide.

⁶ Jack P.F. Gremillion, *A Primer on the Tidelands Controversy and Louisiana’s Experience in the Dispute* 3 (1962).

⁷ *Id.*

⁸ *Id.* at 4 (emphasis original) (see *Pollard's Lessee v. Hagan*, 44 U.S. 212).

⁹ Miller, *supra* note 1, at 207.

¹⁰ *United States v. California*, 332 U.S. 19, 38 (1947).

¹¹ *Id.* at 36-38 (The Court stated that it had used strong enough language to indicate that Pollard would extend to the three mile belt, but that the statements were “merely paraphrases or offshoots of the Pollard inland water rule, and were used, not in enunciation of a new ocean rule, but in explanation of the old inland principle. The Court then explained that by way of the fact that the federal government acquired the three-mile belt and for reasons of national external sovereignty, the federal government had paramount rights in the three mile belt.).

¹² *United States v. Louisiana*, 339 U.S. 699, 701 (1950). [hereinafter *Louisiana I*]

¹³ The title, “*Louisiana I*”, is quoted from Miller, *supra* note 1, at 208.

¹⁴ *Louisiana I* at 701.

¹⁵ *Id.* at 701, 704, 705.

¹⁶ *United States v. Texas*, 339 U.S. 707 (1950).

¹⁷ Submerged Lands Act of 1953, 43 U.S.C. § 1301 (West 2013).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Miller, *supra* note 1, at 209.

²² *Id.* at 210 (citing David Joel Morgan, *The Mississippi River Delta; Legal-Geomorphological Evaluation of Historic Shoreline Changes*, 16 *Geoscience and Man*, Volume 196 (1977)).

²³ 43 U.S.C. § 1301 (West 2013). The Act states: “The term ‘boundaries’ includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as the existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term ‘boundaries’ or the term ‘lands beneath navigable waters’ be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico, except that any boundary between a State and the United States under this subchapter or subchapter II of this chapter which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall remain immobilized at the coordinates provided under such de-

cree and shall not be ambulatory.”

²⁴ Miller, *supra* note 1, at 210.

²⁵ *Id.*

²⁶ *United States v. Louisiana, Texas, Mississippi, Alabama, and Florida*, 363 U.S. 1 (1960). [hereinafter *Louisiana II*]

²⁷ *Id.*

²⁸ The title, “*Louisiana II*”, is quoted from Miller, *supra* note 1, at 211.

²⁹ *Louisiana II* at 76, 83.

³⁰ *Id.* at 66.

³¹ *Id.*

³² *Id.* at 67.

³³ *Id.* at 67-68.

³⁴ *Id.* at 75.

³⁵ *Id.*

³⁶ *Id.* at 76.

³⁷ *Id.* at 79.

³⁸ Ambulatory refers to the fact that Louisiana’s coastline is dynamic and mostly retreating from that time to the present due to erosion and accretion. 2 LA. CIV. L. TREATISE, PROPERTY § 71 (4th ed.).

³⁹ Miller, *supra* note 1, at 213-14.

⁴⁰ *Id.* at 214.

⁴¹ *Id.* (citing *United States v. Louisiana et al.*, 394 U.S. 11 (1969)).

⁴² Convention on the Territorial Sea and the Contiguous Zone, United Nations, Sept. 10, 1964, 516 U.N.T.S. 205.

⁴³ 394 U.S. at 35.

⁴⁴ Miller, *supra* note 1, at 214.

⁴⁵ *Id.*

⁴⁶ *Id.* (citing *United States v. Louisiana*, 420 U.S. 529 (1975)).

⁴⁷ *United States v. Louisiana*, 422 U.S. 13, 17.

⁴⁸ *Id.* at 18.

⁴⁹ LA. REV. STAT. ANN. §§ 49:1, 2, 3.1 (2011).

⁵⁰ LA. REV. STAT. ANN. § 49:2 (2011).

⁵¹ 43 U.S.C. § 1301 (West 2013).

⁵² *Louisiana II* at 80.

⁵³ The Constitution of the United States through the Supremacy Clause provides that federal law is the supreme law of the land and trumps state law when federal law and state law are at odds. U.S. CONST. art. VI, § 2. The Supremacy Clause provides for the doctrines of preemption. In the current matter the doctrine of conflict preemption applies. Conflict preemption occurs when a state law directly conflicts with a federal law. Here, Act No. 336 directly conflicts with the Submerged Lands Act and Louisiana’s court held place within the Sub-

merged Lands Act. 2011 La. Act. 336 § 3.1 (D).

⁵⁴ Louisiana Wildlife and Fisheries Commission, *Minutes*, (May 3, 2012) available at <http://www.wlf.louisiana.gov/commission-meeting-minutes>; Louisiana Wildlife and Fisheries Commission, *Minutes*, (June 7, 2012) available at <http://www.wlf.louisiana.gov/commission-meeting-minutes>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ TEDs are devices on shrimp trawl nets that allow for endangered sea-turtles to escape the net when they are captured. Marjorie Palmer, *Turtle Power Down Under the Sea?: Comparative Domestic and International Protection of Marine Turtles by Australia and the United States*, 37 GA. J. INT'L & COMP. L. 115, 124 (2008).

TEDs are required on all "shrimp trawlers [that are] fishing in the offshore waters of the southeastern United States." Sea Grant: Louisiana Fisheries, *Management Information: TEDs*, <http://www.seagrantsfish.lsu.edu/management/TEDs&BRDs/teds.htm> (last visited Oct. 22, 2012).

⁶⁰ Louisiana Wildlife, *supra* note 54.

⁶¹ *Id.*

⁶² Louisiana Wildlife, *supra* note 54, at 17 (June 7, 2012).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 18.

⁶⁶ Gulf of Mexico Fishery Management Council, 238th Meeting Minutes, 133, (August 22-23, 2012) available at <http://www.gulfcouncil.org/about/ftp.php>.

⁶⁷ Louisiana Wildlife, *supra* note 54, at 2 (August 2, 2012).

⁶⁸ Gulf of Mexico, *supra* note 66, at 133 (August 22-23, 2012).

⁶⁹ Gulf of Mexico Fishery Management Council, 237th Meeting Minutes, 152 (June 20-21, 2012) available at <http://www.gulfcouncil.org/about/ftp.php>.

⁷⁰ *Id.* at 152.

⁷¹ Gulf of Mexico, *supra* note 66, at 133 (August 22-23, 2012).

⁷² Gulf of Mexico, *supra* note 69, at 152 (June 20-21, 2012).

⁷³ See Gulf of Mexico Fishery Management Council, *Regional Management of Recreational Red Snapper*, p. 6, Figure 1.1.1 (August 2013), for an explanation and boundaries of the EEZ.

⁷⁴ Gulf of Mexico, *supra* note 66, at 133 (August 22-23,

2012).

⁷⁵ Gulf of Mexico, *supra* note 69, at 152 (June 20-21, 2012).

⁷⁶ *Id.* at 153-56.

⁷⁷ *Id.* at 156.

⁷⁸ Joe Macaluso, *State goes noncompliant on red snapper*, THE ADVOCATE, March 2, 2013, at 1C, 7C. The Gulf of Mexico Fishery Management Council set a 27-day recreational season starting June 1, 2013, while the state opened its season on March 22 in state waters. Additionally, the Council set a daily limit of two red snapper per angler, while the state set the limit at three red snapper per day per angler.

⁷⁹ *Id.*

⁸⁰ *Texas v. Crabtree*, 1:13-CV-70, 2013 WL 2407674 (S.D. Tex. May 31, 2013).

⁸¹ *Id.*

⁸² 16 U.S.C. § 1811.

⁸³ 16 U.S.C. § 1802 (11); See also Proclamation Numbered 5030, (March 10, 1983).

⁸⁴ 16 U.S.C. § 1856 (b)(1)(B).

⁸⁵ 50 C.F.R. § 600.605, 50 C.F.R. § 600.610.

⁸⁶ 50 C.F.R. § 600.610 (a)(1) and (2), 16 U.S.C. § 1856(b)(1).

⁸⁷ Namely, the area that is beyond the three mile boundary that the Supreme Court set for Louisiana.

⁸⁸ The Secretary of Commerce is granted the authority to pursue the ALJ's decision. 50 C.F.R. § 600.625.

⁸⁹ 50 C.F.R. § 600.625 (b)(1).

⁹⁰ Administrator is the Administrator of the National Oceanic and Atmospheric Administration.

⁹¹ 50 C.F.R. § 600.625 (b)(1) (emphasis added).

⁹² *Bateman v. Gardner*, 716 F. Supp. 595, 596-97 (S.D. Fla. 1989), 922 F.2d 847 (11th Cir. 1990).

⁹³ *Id.* at 598.

⁹⁴ *Id.*

⁹⁵ *Medeiros v. Vincent*, 431 F.3d 25 (1st Cir. 2005).

⁹⁶ *Id.* at 27.

⁹⁷ *Id.* (citing 16 U.S.C. § 5102(3)).

⁹⁸ *Id.*

⁹⁹ *Id.* (citing 16 U.S.C. §§ 5101-5108).

¹⁰⁰ *Id.* (citing 16 U.S.C. §§ 5104(a)(1), 5101(a)(4)).

¹⁰¹ *Id.* (citing 16 U.S.C. § 5106(a)).

¹⁰² *Id.* (emphasis added) (citing 16 U.S.C. § 5106(c)).

¹⁰³ *Brown v. Board of Education of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954).

¹⁰⁴ *Fallout*, With All Deliberate Speed: The Legacy of *Brown v. Board* (last visited Sept. 6, 2012), <http://www.brownvboard.info/fallout.htm>.

¹⁰⁵ *Stand in the Schoolhouse Door*, ENCYCLOPEDIA OF

ALABAMA (last visited Sept. 6, 2012), <http://www.encyclopediaofalabama.org/face/Article.jsp?id=h-1872>.

¹⁰⁶ Stephan Leshner, *George Wallace: American Populist* 233 (1995).

¹⁰⁷ Benjamin Alexander-Bloch, *Federal fisheries officials say 'honeymoon over' – six red snapper violations issued*, NOLA.COM/THE TIMES PICAYUNE, May 1, 2013, http://www.nola.com/outdoors/index.ssf/2013/05/federal_fisheries_officials_sa.html.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ *Id.*

¹¹¹ “[P]ublic entity” means and includes the state and any of its branches, departments, offices, agencies,

boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions.” LA. REV. STAT. ANN. § 9:2798.1(A) (2011).

¹¹² LA. REV. STAT. ANN. § 9:2798.1(B) (2011).

¹¹³ James Wilkins, *Is Sea Level Rise “Foreseeable”?* *Does it matter?*, 26 J. LAND USE & ENVTL. L. 437, 462 (2011).

¹¹⁴ *Hardy v. Bowie*, 98-2821. (La. 9/8/99), 744 So. 2d 606, 613 (citing *Berkovitz v. United States*, 486 U.S. at 536 (1988)).

Increasing Sea Turtle Mortality and the Shrimp Trawl Fisheries Industry

By Paige Gallaspy

Over the past two years, the National Oceanic and Atmospheric Administration’s (NOAA) National Marine Fisheries Service (NMFS) has documented an increase in sea turtle strandings compared to previous years.¹ Strandings are defined as “turtles that [are] ashore, dead or alive, or are found floating dead or alive (generally in a weakened condition).”² In 2011, a total of 525 turtle strandings were documented in Alabama, Louisiana and Mississippi.³ In 2012, a total of 466 strandings were documented in Alabama, Louisiana, Mississippi and Texas, and so far in 2013, 545 strandings have been documented throughout this same range.⁴ In comparison, the average strandings reported from Mississippi to Alabama waters during the months of March to June from 2005-2009 was only 16.⁵ Thus, the data indicates that stranding numbers are significantly on the rise.

Though there are many possible reasons for the increased strandings in the Northern Gulf of Mexico, evidence of forced submergence was observed in many of the carcasses that were examined.⁶ The most probable cause of forced submergence is the incidental capture of turtles in fishing gear. Prompted by the increase in incidental capture of sea turtles and increased strandings, the NMFS published a proposed rule to protect sea turtles from incidental takings in United States waters on May 12, 2012.⁷ First, the proposed rule would have withdrawn the alternative tow time restriction. Alternative tow time restrictions limit tow times to

55 minutes from April 1 through October 31, and 75 minutes from November 1 through March 31, allowing any sea turtle that may be caught in the net to be removed before it drowns.⁸ Second, the regulation would have required the use of Turtle Excluder Devices (TED) on all skimmer trawls, pusher-head trawls, and wing nets (collectively referred to as the skimmer trawl fisheries) to be rigged for fishing. Concurrently with the proposed rule, a Draft Environmental Impact Statement (DEIS) analyzing the effects of the proposed rule was published on May 18, 2012.⁹ However, on February 7, 2013, the NMFS withdrew the proposed rule.¹⁰ Part I of this article provides a brief discussion of the Endangered Species Act and the origin of the TEDs, and Parts II and III address the potential expansion of the regulation and subsequent withdrawal of the proposed rule. Part IV ends with a short update on the Kemp’s ridley sea turtle and its recovery.

I. Turtle Excluder Devices and the Endangered Species Act

The Endangered Species Act of 1973 (ESA) was passed by Congress in the 1970s. The ESA establishes a program to protect at-risk species from extinction “as a consequence of economic growth and development untempered by adequate concern and conservation.”¹¹ Pursuant to that end, Section 4 of the ESA divides the responsibilities for listing species between the Secretary of the Interior (responsible for

all terrestrial species) and the Secretary of Commerce (responsible for marine species). The Secretary of the Interior delegated its power to the United States Fish and Wildlife Service (USFWS), while the Secretary of Commerce delegated its power to the NMFS.¹² While the two agencies share responsibility for those species that live in both jurisdictions, such as sea turtles, the NMFS is the lead for in-water conservation of sea turtles.¹³

The ESA mandates that the Secretary “issue such regulations as he deems necessary and advisable to provide for the conservation of [threatened] species.”¹⁴ The conservation of a species is defined as “all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”¹⁵ The court in *Defenders of Wildlife v. Andrus* found that the statute requires more than just merely avoiding the elimination of a protected species:¹⁶ “It must bring these species back from the brink so that they may be removed from the protected class, and it must use all methods necessary to do so.”¹⁷ Therefore, the Secretaries of Interior and Commerce have an affirmative duty to ensure the conservation of protected species.

Section 11 of the Act directs the Secretary of Commerce to enforce the provisions of the Act and promulgate regulations as may be appropriate.¹⁸ If the secretary fails to enforce the prohibitions of the Act, any person may commence a civil suit: (1) to enjoin any person or governmental agency who is alleged to be in violation of any provision of the Act, (2) to compel the Secretary to apply the prohibitions of the Act with respect to the taking of any resident endangered species or threatened species, and (3) against the Secretary for the failure to perform any nondiscretionary duty under Section 4.¹⁹

A. Background Information About Sea Turtles

All sea turtles that are found in the territory of the United States are listed either as endangered or threatened under the ESA, and the NMFS is required to protect them.²⁰ The Kemp’s ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricate*) are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) sea turtle are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.²¹ A “threatened species” means “any species that is likely

to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”

²² An “endangered species” is one that is “in danger of extinction throughout all or a significant part of its range.”²³

The Kemp’s ridley historically is the most endangered species of sea turtle and has been listed on the Endangered Species list since 1970.²⁴ The Kemp’s ridley nests in daytime aggregations known as arribadas, mostly in Mexico, almost exclusively on a 16-mile stretch of beach near the village of Rancho Nuevo in Tamaulipas, Mexico. In the U.S., a small amount of nesting occurs in Texas. Outside of nesting, the species’ major habitat is the near shore and inshore waters of the northern Gulf of Mexico and northwestern Atlantic Ocean.²⁵ “Studies suggest that sub-adult Kemp’s ridleys stay in shallow, warm, near-shore waters in the northern Gulf of Mexico until cooling waters force them offshore or south along the Florida coast.”²⁶ When nesting aggregations were discovered at Rancho Nuevo in 1947, nesting female populations were estimated at 40,000 individuals. By the mid 1980’s, the nesting estimates had dramatically declined to approximately 300 nesting females.²⁷

Sea turtles face many human-caused threats, and their populations have suffered as a result. Traditional culture in Mexico prized turtle eggs as a delicacy, and there was no prohibition or limit on harvesting the eggs.²⁸ This practice undoubtedly led to the initial rapid demise of the Kemp’s ridley population. However, now that protections of Kemp’s ridley nesting sites are in place, shrimp trawling is the biggest known source of sea turtle death caused by humans in the United States.²⁹ A National Academy of Sciences (NAS) study concluded in 1990 that drowning in shrimp trawls “kills more sea turtles than all other human activities combined.”³⁰ Though sea turtles are able to take lengthy dives, a study conducted by Henwood and Stuntz in 1987 revealed a linear relationship between tow time and sea turtle death.³¹ The National Research Council examined Henwood and Stuntz’s data set and reported, “Death rates are near zero until tow times exceed 60 minutes; then they rise rapidly with increasing tow times to around 50% for tow times in excess of 200 minutes.”³²

Once included on the endangered species list, section 9 (16 U.S.C. 1538) of the ESA prohibits the incidental taking of sea turtles, “with exceptions identified in 50 C.F.R. 223.206(d), or according to the terms and conditions of a biological opinion issued

under section 7 of the ESA, or according to an incidental takings permit issued under section 10 of the ESA.”³³ To “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”³⁴ The prohibitions apply to threatened as well as endangered sea turtles.³⁵

The incidental taking of sea turtles is exempt from the section 9 prohibition if the conservation measures specified in 50 C.F.R. 223.205 are met. This regulation requires most shrimp trawlers in the Atlantic Area or Gulf Area to have a NMFS-approved TED installed in each net that is rigged for fishing (exemptions from the requirement are listed below).³⁶ A TED is usually made up of a rigid or soft grid-like structure located inside the net and is meant to deflect turtles that are caught by the trawl nets out of an opening, while allowing the smaller catch, like shrimp, to continue into the cod end.³⁷ To be approved by NMFS, a TED design must be shown to be 97% effective in excluding sea turtles during testing based upon NMFS-approved testing protocols.³⁸ Currently, TEDs that are approved are the single grooved hard TED, hooped hard TEDs, and the Parker soft TED.³⁹ In 2003, NMFS amended the sea turtle conservation regulations to protect the larger species of sea turtle, such as the loggerhead, green and leatherback, by requiring a larger opening to allow the turtles to escape.⁴⁰ The regulation also lists exemptions from the TED requirement. Skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) may use alternative tow times in lieu of TEDs.⁴¹

B. Implementation of the First TED Requirement

At first, the NMFS attempted to persuade shrimp fishermen to use the TEDs on a voluntary basis. They found this tactic largely unsuccessful; only about two to three percent of the offshore shrimpers used the device.⁴² As a result, in 1986 the Center for Environmental Education (CEE) gave written notice to the Secretary of Commerce pursuant to §1540 of the Act that the Secretary was violating the Act by not closing the shrimping industry or taking other steps to eliminate the taking of sea turtles in shrimp nets.⁴³ In response to the possibility of litigation, in 1987 the NMFS issued regulations requiring shrimp trawlers in the Gulf and South Atlantic to reduce the incidental take of sea turtles by requiring the use of TEDs.

In October 1987, the State of Louisiana and the Concerned Shrimpers of Louisiana (Concerned Shrimpers) filed a complaint against the U.S. Secretary

of Commerce alleging that both the TED and the tow time limit requirements were invalid. In *Louisiana ex rel. Guste v. Verity*, the state claimed that the “regulations [were] arbitrary and capricious, unsupported by the record, and were promulgated in violation of the Administrative Procedure Act’s procedural requirements and Executive Order 12291’s requirement of a regulatory impact analysis,” and that “the regulations [violated] the Louisiana shrimpers’ due process and equal protection rights.”⁴⁴ The arbitrary and capricious standard requires the court to “review the agency action to determine whether the decision ‘was based on a consideration of the relevant factors and whether there was clear error of judgment.’”⁴⁵ The Fifth Circuit Court of Appeals upheld the regulation and stated the regulations were not arbitrary and capricious and did not violate equal protection guarantees.⁴⁶

The *Verity* court addressed the three main arguments made by the shrimping industry to oppose the use of TEDs: economic loss, selective enforcement, and extrapolation of figures. First, the *Verity* court determined that the shrimpers were required to purchase and install certified TEDs that cost approximately \$200-400 per TED. The *Verity* court stated that the annual cost to the entire industry was estimated to be \$5.9 million.⁴⁷ The court recognized the shrimping industry’s concern that the cost was substantial but stated that “Congress has decided that these losses cannot compare to the ‘incalculable’ value of genetic heritage embodied in any protected living species.”⁴⁸ The industry also claimed that the TEDs caused a loss of shrimp, between 30 and 50 percent.⁴⁹ However, studies conducted by NOAA found that the loss of shrimp was closer to 10 percent, with an average reduction in bycatch of 13 percent.⁵⁰ The court further stated that no other less costly means have been found to afford the same protections to the sea turtles; therefore, “the costs shouldered by the industry are not arbitrary, but reasonable related to Congress’s purpose.”⁵¹

The second argument was that the TED regulations constitute selective enforcement “because they do not address other serious causes of sea turtle [death].”⁵² The *Verity* court found that the regulation’s failure to address all causes of sea turtle death was not arbitrary and capricious.⁵³ The court stated that there was a “well-established rule that regulations need not remedy all evils” and “the agency’s decision to attack one of the major causes of sea turtle mortality through regulation is entirely within its discretion.”⁵⁴ The Concerned Shrimpers also argued that there was no proof that the regulations would

save the Kemp's ridley and increase their numbers.⁵⁵ However, the *Verity* court held that the regulation could not be invalidated on the grounds that the record does not demonstrate that the effort will enhance the species' chance of survival. Instead, the court found that the record "need only show that such regulations do in fact prevent prohibited takings of protected species" and that the record provided by the Secretary satisfied that burden.⁵⁶

Lastly, shrimpers argued that the figures regarding sea turtle mortality were inaccurate and that the administrative record was not sufficient to support the TED and trawling-period regulations.⁵⁷ The state argued that the scientific data of sea turtle mortality relied upon by NMFS was unreasonable because of the small sample size used for the extrapolation.⁵⁸ The *Verity* court, however, found that the "method of extrapolating the magnitude of sea turtle takings in shrimp trawls [did] not necessarily appear unreasonable."⁵⁹ The court acknowledged the state's argument that the regulations were based upon one study, but found that "under the arbitrary-and-capricious standard, our deference to the agency is greatest when reviewing technical matters within its area of expertise, particularly its choice of scientific data and statistical methodology."⁶⁰ Hence, the court found that the agency presented scientific conclusions that were rational and not unreasonable.

C. Impact of current TED requirements

After politically induced delays, TEDs were first fully implemented seasonally in 1990.⁶¹ The requirements were expanded in 1994 to require TEDs "in all areas where the southeastern U.S. shrimp fishery operated and at all times of the year."⁶² Since 1990, human-induced sea turtle mortality has been reduced by 44%-50%.⁶³ According to the Bi-National Recovery Plan, "[c]onservation efforts on the primary nesting beaches in Mexico and required TED-use in the U.S. and Mexico are the likely reasons for the population's increase."⁶⁴

A NOAA analysis was conducted in 2002 to examine the economic impact of the TED regulations in the Gulf and South Atlantic fisheries: "This analysis indicated that the large vessel component of the fishery was profitable to highly profitable between 1998 and 2000."⁶⁵ In 2001, economic conditions changed, including a rise in fuel prices and inflation, and the shrimp industry suffered as a result.⁶⁶ According to the analysis, "rapidly declining [shrimp] prices have been the primary source

of the recent deterioration in the industry's economic condition," due to reduced shrimp abundance and foreign shrimp importation.⁶⁷ The study indicates that the unsteady economic conditions faced by the shrimping industry was not attributable to the TED requirement and that the main issues effecting the industry were fuel prices and declining shrimp prices. Another study found that competition with aquaculture and imported shrimp and the 2005 hurricane season also contributed to the decline in the size of the shrimp trawling industry.⁶⁸

The TED requirement has not had wholly negative impacts on the shrimping industry and can actually provide savings for shrimpers. Both scientists and some in the shrimping industry have stated that TEDs provide some benefit to shrimp fishermen, such as reducing the amount of non-targeted species (bycatch). Bycatch are harvested along with shrimp because shrimp trawls harvest nonselectively.⁶⁹ The bycatch is usually dumped overboard, resulting in a significant waste of fishery resources.⁷⁰ The TED not only deflects sea turtles, but also larger bycatch, reducing the amount of catch the shrimpers must sort through in order to collect the shrimp. The reduced bycatch may also reduce fuel costs as the amount of unproductive catch is reduced, decreasing the amount of drag on the vessel's engine.⁷¹ Therefore, while implementing the standard use of TEDs in the Atlantic and Gulf areas initially proved to be a challenge, today, some have embraced the regulation.

II. Proposed Rule and Reasoning Behind its Promulgation

As stated above, the number of strandings has increased significantly in recent years. In order to reduce the amount of incidental takings, the NMFS is re-evaluating the effectiveness of the turtle conservation requirements with the skimmer trawl industry. Currently, TEDs are not required in many trawl fisheries that interact with sea turtles.⁷² The exemption for the trawl fisheries was authorized after a December 2, 2002, Biological Opinion found that the tow time restriction instead of TEDs was allowed for fisheries that, "out of physical, practical, or economic necessity, require fishermen to limit their tow times naturally."⁷³ To combat the rising numbers of sea turtle takes, NMFS considered other alternatives to the tow time requirement.

A. Reasons for Considering the Withdrawal of Alternative Tow Times

One of the alternatives to reducing sea turtle mortality is to withdraw the alternate tow time restrictions in 50 C.F.R. § 223.206(d)(2)(ii)(A)(3) and require all skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) rigged for fishing to use TEDs in their nets. According to the Scoping document, this would apply only to shrimping vessels in the Gulf of Mexico and the Atlantic Ocean.⁷⁴

The new requirements were considered because (1) “over the past two years NOAA Fisheries has documented elevated sea turtle strandings in the northern Gulf of Mexico,” and (2) “many skimmer trawl vessels have increased the size and amount of gear fished beyond what was originally established within a fishery,” and because of larger net use, there is an increased possibility that a sea turtle could be captured in the mouth of the net and not be visible during inspection of the cod end of the net.⁷⁵ Skimmer trawls are used to catch shrimp in inshore waters in the southeastern U.S. (except Texas), and have become popular in use because they are exempt from the TED requirement (they are still required to abide by the tow time restrictions).⁷⁶

Further, NOAA Fisheries and some environmental groups noticed that there have been compliance issues with the tow time requirements and that tow times are difficult to enforce.⁷⁷ NMFS has also noted compliance issues with other TED requirements, ranging from a lack of TED use, TEDs sewn shut, and TEDs being manufactured that do not meet the regulatory requirements.⁷⁸ Federal officials observed additional areas of concern regarding TED requirements. First, officials noted that there were TEDs being used with excessively steep grid angles (i.e. above the 55-degree maximum). Second, officials observed some TEDs with escape openings that did not meet the required minimum measurements.⁷⁹ Steeper angles than the maximum amount are of particular concern to juvenile turtles, as NMFS has observed that even slight increases past the 55-degree maximum will prevent sea turtles from escaping the net. Likewise, insufficient opening sizes are of concern because it will prevent larger sea turtles from escaping the net.⁸⁰

Shrimp fishermen are blaming the *Deepwater Horizon* oil spill for the increase in deaths in recent years. However, sampling by federal officials of 120

turtle strandings in June of 2010 did not show any signs of external oiling to indicate a causal relationship with the spill.⁸¹ Other groups firmly believe that it is the lack of compliance with TED requirements that are causing the elevated turtle strandings. According to the advocacy group Oceana, which examined memos from federal fisheries officials, of the “76 vessels checked in the Gulf of Mexico, 17 percent had no turtle-excluder devices or the devices were blocked intentionally.”⁸² Further, the study also stated that out of 112 documented vessels inspected in the Gulf, only 23 (or 21 percent) were fully compliant with TED requirements.⁸³ In May and June 2011, several environmental non-governmental organizations (NGOs), including Oceana, filed petitions against NOAA over its mismanagement of the shrimp trawl industry.⁸⁴ The NGOs demanded that the entire shrimp industry be shut down due to its interactions with the Kemp’s ridley. NOAA reached a settlement with the NGOs and agreed to propose new requirements for the protection of the sea turtles.⁸⁵

B. Actions NOAA Took to Ensure Compliance

In the meantime, NOAA’s Office of Law Enforcement is taking action to enforce compliance with the TED regulations. Their mission is to ensure compliance with the laws and regulations enacted to conserve the nation’s marine resources.⁸⁶ At the start of the shrimping season in 2011, NOAA special agents and enforcement officers inspected more than 444 vessels for TED compliance. In the majority of the instances (371 to be exact), nets were found to be in compliance. In other instances, NOAA personnel worked with shrimpers to comply with the regulations, providing a hands-on approach to educating the shrimpers to properly install the TEDs. The outreach efforts have encouraged shrimpers to request courtesy checks to insure that their vessels are in compliance.⁸⁷

However, violations were also found during the inspection, and there were 81 verbal warnings given, 20 written warnings, and 59 potential additional charges that are being reviewed by NOAA attorneys or the Department of Justice.⁸⁸ In addition, Notices of Violation and Assessment (NOVAs) were issued to 34 vessels for TED violations. NOVAs require that the owner of the vessel respond within 30 days either by paying a penalty or requesting modification or a hearing. Penalties range from \$2,500 to \$23,000, depending on the size of the vessel and other circumstances particular to each case.⁸⁹

C. The Draft Environmental Impact Statement

The Draft Environmental Impact Statement (DEIS) demonstrated that withdrawing the alternative tow time restriction and requiring all skimmer trawls, pusher-head trawls, and wing nets rigged for fishing to use TEDs in their nets “would reduce incidental bycatch and mortality of sea turtles in the southeastern U.S. shrimp fisheries and, therefore, may be a necessary and advisable action to conserve threatened sea turtle species.”⁹⁰ The DEIS analyzed both the benefits of exclusion of sea turtles through properly installed TEDs and the effect of TED violations on sea turtle capture rates and total mortalities.⁹¹ The calculation was based on overall compliance and non-compliance rates in the Gulf of Mexico and the Atlantic areas based on vessel boarding data from TED inspections.⁹² The analysis estimated that withdrawing the tow time restrictions and requiring TED usage would prevent 5,515 sea turtle mortalities in the combined skimmer trawl fisheries.⁹³ Due to the analysis conducted in the DEIS, the NMFS expected to promulgate a final rule no later than March 15, 2013. However, as seen below, the NMFS determined that withdrawing the tow time restrictions was not necessary.

III. Withdrawal of the Proposed Rule and Where We Stand Today

The NMFS determined that withdrawing the alternative tow time restriction and requiring previously exempt vessels to use TEDs is not warranted at this time.⁹⁴ The NMFS came to this conclusion after it shifted turtle observer effort from the offshore otter trawl shrimp fishery to the inshore skimmer trawl fisheries in northern Gulf of Mexico to gather more information on the potential impact to the sea turtle population.⁹⁵ From the data gathered, the NMFS determined that their previous estimates were overly conservative. The revised capture and mortality rate estimates are 1,893 sea turtle mortalities per year, versus 2,066-6,386 estimated for the Gulf of Mexico in the DEIS.⁹⁶

In addition, the NMFS noted that the majority of skimmer trawls operate in Louisiana inshore waters, where federal TED requirements are not enforced by state law enforcement due to state legislation and a significant resistance to the original TED requirements. Therefore, compliance with the proposed rule would not be very high.⁹⁷ The NMFS concluded that the potential benefits of a TED requirement in the Gulf of Mexico skimmer trawl fisheries are significantly less than previously estimated.⁹⁸ Given the uncertain ecological

benefit to sea turtle populations and the significant economic ramifications for the skimmer trawl fisheries, the NMFS concluded that a final rule to require all skimmer trawls, pusher-head trawls, and wing nets in the Gulf of Mexico to use TEDs is not warranted.⁹⁹

Regarding the North Carolina skimmer trawl fisheries, observer coverage has also increased, but new data is currently not available. However, given the that sea turtle mortality rates in the Gulf was found to be overestimated, and the observer information drastically changed the NMFS’s understanding of very important variables, the NMFS determined that a proposed rule for the North Carolina skimmer trawl fishery is also not warranted at this time.¹⁰⁰

IV. The Kemp’s Ridley Success Story

The principle goal of the U.S. Fish and Wildlife Service and the NMFS is “to return listed species to a point at which protection under the Act is no longer required.”¹⁰¹ Current scientific data indicate that the Kemp’s ridley has made a substantial comeback in population and nesting sizes. Coordinated efforts between Mexico and the United States have resulted in greater protection of the species. The recovery strategies being used today have proved successful, and models predict that the species may meet qualifications for delisting within the next decade.¹⁰²

According to the ESA, the Secretary may add a species to the list, designate or change an area of critical habitat, or change the listed status of a species.¹⁰³ The Secretary makes this determination solely on the basis of the best available scientific and commercial information, without taking into account any economic impact the determination may have. The factors considered when delisting a species are found in paragraph (c) of this section, and such removal must be supported again by the best scientific and commercial data available.¹⁰⁴ The type of data reviewed by the Secretary may include “scientific or commercial publications, administrative reports, maps or other graphic materials, information received from experts on the subject, and comments from interested parties.”¹⁰⁵

As stated above, Kemp’s ridley nesting populations reached its lowest in the mid-1980’s, which indicates a lower population size as a whole. Intensive conservation efforts by researchers and volunteers as well as governmental agencies have proved successful. In 2009, more than 21,000 nests were observed. From

1988-2003, the number of nests observed at Rancho Nuevo and nearby beaches increased by 15% per year.¹⁰⁶

The success of the Kemp's ridley is due in part by the cooperation between Mexico and the U.S. In 1966, the Mexican government started a Kemp's ridley recovery program and began a research and conservation program near their nesting site in Rancho Nuevo focused on nest protection and hatchling production.¹⁰⁷ In 1978, a bi-national recovery plan between Mexico and the United States was developed to restore the Kemp's ridley population to a sustainable level.¹⁰⁸ A "headstart" program was created, which is a process whereby sea turtles hatchlings are caught and held for a period of time so that, presumably, the high neonatal mortality will be circumvented.¹⁰⁹ Between 1978 and 1988, a total of 22,507 eggs were collected and sent to Padre Island National Seashore (PAIS) in an attempt to form a secondary beach colony.¹¹⁰ The eggs were collected as they were laid in an attempt to prevent them from touching the Rancho Nuevo beach and imprinting. These eggs were buried on PAIS and allowed to hatch and swim 5-10 meters for the imprinting process before they were collected and taken to the NMFS laboratory in Galveston for one year to allow the hatchlings to grow larger and thus increase survival chances. The survival rate for this bi-national effort was 90% or greater, whereas first-year survival in the wild is approximated at less than 1%.¹¹¹ A headstarting program was also conducted from Rancho Nuevo; approximately 10,198 sea turtles were headstarted between 1978 and 2000 (the program was not done consecutively each year, but intermittently between years).¹¹² According to one study, since 1996, "the Kemp's ridleys documented nesting in Texas have been a mixture of headstarted turtles and turtles from wild stock."¹¹³ The documented nesting by some of the headstarted Kemp's ridley turtles has greatly contributed to the increase in number of nests in Texas since 1996, as well as to the increase in the population as a whole.¹¹⁴

In addition to the bi-national headstarting effort, in 1993, the Mexican government mandated the use of TEDs in the Gulf of Mexico and the Caribbean.¹¹⁵ The Mexican government also focused its recovery efforts on the primary nesting grounds of the Kemp's ridley, Rancho Nuevo, and in 1997 the beach was declared a National Reserve.¹¹⁶ Sailing and fishing within 6 km of Rancho Nuevo has been prohibited since 1986.¹¹⁷

In order for the Kemp's ridley to be removed from the Endangered and Threatened Species List, it must meet

certain stages of criteria. Downlisting criteria require a population level of at least 10,000 nesting females in a season located in their primary nesting beaches in Mexico¹¹⁸ and "recruitment of at least 300,000 hatchlings to the marine environment per season at the primary nesting beaches in Mexico."¹¹⁹ To attain delisting, there must be a 6-year average of 40,000 nesting females per season.¹²⁰

The *Bi-National Recovery Plan for the Kemp's Ridley Sea Turtle* states that to continue this recovery track, conservation efforts must be maintained and strengthened, such as expanding the use of TEDs to all trawl fisheries and adequately enforcing the requirement.¹²¹ According to the Bi-National Plan, if the population growth and recruitment of the Kemp's ridley maintains its current trajectory, scientist estimate that the species may reach an important delisting requirement of 40,000 nesting females per season over a period of 6 years by 2024.¹²² The best available data indicate that it is important that the conservation efforts continue to focus on the protection of the Kemp's ridley in both the marine environment, through TEDs, and the terrestrial environment, through the protection of nests.

V. Conclusion

Today, sea turtle stranding numbers continue to be high, at 518 total stranding so far this year.¹²³ Though other programs are helping the species recover, such as the headstart program or bi-national efforts, the data indicates that a significant number of strandings are still occurring in the Gulf area. The NMFS has stated that it believes it must collect additional data through the observer program, collect more information on interactions during the winter months and explore technological solutions to address small turtle issues. The NMFS will continue to improve its outreach program, including more education on tow time requirements, likely leading to improved compliance and decreasing sea turtle mortality rates in the inshore skimmer trawl industry.



Endnotes:

¹ *Sea Turtle Strandings in the Gulf of Mexico* (July 18, 2013), <http://www.nmfs.noaa.gov/pr/species/turtles/gulfofmexico.htm>. [hereinafter *Strandings*]

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ U.S. Dep't. of Commerce, Scoping Document for Preparation of a Draft Environmental Impact Statement to Reduce Incidental Bycatch and Mortality of Sea Turtles in the Southern U.S. Shrimp Fishery 2 [hereinafter *Scoping document*] (June 20, 2011) available at <http://sero.nmfs.noaa.gov/pr/endangered%20species/Shrimp%20Fishery/SCOPING%20DOCUMENT.pdf> (explaining that increased coverage of beach areas due to the Deepwater Horizon oil spill event may have led to the increase documentation of stranded sea turtles).

⁶ *Strandings*, *supra* note 1.

⁷ Sea Turtle Conservation and Shrimp Trawling Requirements, 77 FED. REG. 27411 (proposed May 10, 2012).

⁸ 50 C.F.R. § 223.206.

⁹ Environmental Impacts Statements and Notice of Availability, 77 FED. REG. 29636 (May 18, 2012).

¹⁰ Sea Turtle Conservation and Shrimp Trawling Requirements, 78 FED. REG. 9024 (proposed Feb. 7, 2013).

¹¹ The Endangered Species Act of 1973, 16 U.S.C. § 1531.

¹² James C. Kilbourne, *The Endangered Species Act under the Microscope: A Closeup Look from a Litigators Perspective*, 21 ENVTL. L. 499, 502 (1991).

¹³ Scoping Document, *supra* note 5, at 4.

¹⁴ 16 U.S.C. § 1533(d).

¹⁵ 16 U.S.C. § 1532(3).

¹⁶ *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167, 170 (D.D.C. 1977).

¹⁷ *Id.*

¹⁸ 16 U.S.C. § 1540.

¹⁹ *Id.*; see also Jim Wilkins, *TEDs and The Endangered Species Act of 1973*, LA. COASTAL LAW, La. Sea Grant, Aug. 1987 at 56, available at http://www.lsu.edu/sglegal/pdfs/lcl_56.pdf.

²⁰ Anthony Margavio and Shirley Laska, *A Sociopolitical Analysis of Marine Resource Management: The TEDs Case*, Working Paper Number 3, University of New Orleans.

²¹ 50 C.F.R. § 17.11.

²² 16 U.S.C. § 1532(20).

²³ 16 U.S.C. § 1532(6).

²⁴ Kemp's Ridley sea turtle fact sheet, US Fish and Wildlife Services (Feb 2006) <http://www.fws.gov/kempsridley/kempfactsheet.html>.

²⁵ *Id.*; See also Nat'l Marine Fisheries Serv. et al., Bi-National Recovery Plan for the Kemp's Ridley Sea Turtle (*Lepidochelys kempii*) 2nd Revision (2011), National Marine Fisheries Service, p. I-10-11, available at http://www.nmfs.noaa.gov/pr/pdfs/recovery/kemp-sridley_revision2.pdf. [hereinafter *Bi-National Recovery Plan*]

²⁶ Nat'l Marine Fisheries Serv., Endangered Species Act Section 7 Consultation, Biological Opinion, p. 21 [hereinafter *Biological Opinion*] (Dec 2, 2002); See also Renaud, M.L., J.M. Nance, E. Scott-Denton, G.R. Gitschlag, Incidental Capture of Sea Turtles in Shrimp Trawls with and without TEDs in U.S. Atlantic and Gulf Water (Chelonian Conservation and Biology, International Journal of Turtle and Tortoise Research 2: 425-427, 1997).

²⁷ Bi-National Recovery Plan, *supra* note 25, at vi.

²⁸ *Sea Turtle Meat Still Considered a Delicacy*, BANDERAS NEWS (Sept. 2005), available at <http://www.banderasnews.com/0509/nr-huevos.htm>.

²⁹ *Sea Turtle Conservation and the Shrimp Industry: Hearings Before the Subcomm. On Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant and Marine and Fisheries*, 101st Cong., 2d Sess. 182 (1990) [hereinafter *Hearings*] (statement of William Fox, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration); See also Kathleen Doyle Yaninek, *Turtle Excluder Device Regulations: Laws Sea Turtles Can Live with*, 21 N.C. Cent. L.J. 256 (1995) [hereinafter *Yaninek*]

³⁰ Deborah Crouse et al., *The TED Experience: Claims and Reality* 3 (1992).

³¹ Biological Opinion, *supra* note 26, at 34.

³² *Id.*, (citing J.J. Magnuson et al. *Decline of the sea turtles: causes and prevention* 274 (National Academy Press 1990)).

³³ Intent to Prepare an Environmental Impact Statement for Sea Turtle Conservation and Recovery Actions and To Conduct Public Scoping Meetings, 50 C.F.R. Part 223 (proposed June 24, 2011).

³⁴ 16 U.S.C. § 1532(19).

³⁵ 50 C.F.R. § 223.205.

³⁶ 50 C.F.R. § 223.206.

³⁷ 50 C.F.R. § 223.207.

³⁸ 50 C.F.R. § 223.207(e)(1).

³⁹ 50 C.F.R. § 223.207(a).

⁴⁰ Endangered and Threatened Wildlife; Sea Turtle Conservation Requirements, 68 FED. REG. 8456 (proposed Feb. 21, 2003) (codified at 50 CFR pts. 222, 223 and 224).

⁴¹ 50 C.F.R. § 223.206(d)(2)(ii)(A).

⁴² *Hearings*, *supra* note 29, at 184.

⁴³ Wilkins, *supra* note 19, at 2.

⁴⁴ *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 326 (5th Cir. 1988).

⁴⁵ *Id.* at 327.

⁴⁶ *Id.*

⁴⁷ *Id.* at 331.

⁴⁸ *Id.*

⁴⁹ Yaninek, *supra* note 29, at 272.

⁵⁰ *Id.* at 273 (citing *Hearings*, *supra* 29 (testimony of Marvin Hichman, President of the Concerned Shrimpers of America)).

⁵¹ *Verity*, 853 F.2d at 331.

⁵² *Id.* at 332.

⁵³ *Id.*

⁵⁴ *Id.* at 332.

⁵⁵ *Id.*

⁵⁶ *Id.* at 333.

⁵⁷ *Id.* at 328.

⁵⁸ *Id.*

⁵⁹ *Id.* at 329.

⁶⁰ *Id.*

⁶¹ Bi-National Recovery plan, *supra* note 25, at I-50.

⁶² *Id.*

⁶³ *Id.* at I-26.

⁶⁴ *Id.* at II-1.

⁶⁵ Michael D. Travis and Griffin L. Wade, Update on the Economic Status of the Gulf of Mexico Commercial Shrimp Fishery 3 (2004) available at <http://sero.nmfs.noaa.gov/sf/socialsci/pdfs/EconUpdateGulfShrFinal.pdf>.

⁶⁶ *Id.* at 4.

⁶⁷ *Id.*

⁶⁸ *Bi-National Recovery Plan*, *supra* note 26, at I-49.

⁶⁹ Daniel A. Warner et al., *The Efficiency of a Bycatch Reduction Device Used in Skimmer Trawls in the Florida Shrimp Fishery*, 24 N. AM. J. OF FISHERIES MGMT. 853 (2004).

⁷⁰ Yaninek, *supra* 52, at 270.

⁷¹ *Verity*, 853 F.2d at 330.

⁷² *Bi-national Recovery Plan*, *supra* note 25, at I-51.

⁷³ *Biological Opinion*, *supra* note 26, at 5.

⁷⁴ *Scoping Document*, *supra* note 5, at 6; *see also* 77 Fed. Reg. 27411, *supra* note 7, at 27413 (explaining that the proposed rule would affect approximately 2,248 vessels in Louisiana, 62 in Mississippi, 60 in Alabama and 65 in North Carolina).

⁷⁵ *Id.* at 2.

⁷⁶ *Bi-National Recovery Plan*, *supra* note 25, at I-51.

⁷⁷ *Id.*

⁷⁸ *Scoping document*, *supra* note 5, at 3.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 2.

⁸² Renee Schoof, *Inspections Show Violations of Rules on Turtle Excluder Devices*, McClatchy DC, July 19, 2011, <http://www.mcclatchydc.com/about-us/>.

⁸³ Oceana, *Unacceptable Violations of Sea Turtle Protections in the U.S. Shrimp Fishery*, (July 19, 2011) *available at* http://oceana.org/sites/default/files/Gulf_TED_Compliance_Report.pdf.

⁸⁴ *NOAA Reaches Settlement with NGOs on Turtle Lawsuit, Issues Propose Regulations for Skimmer Trawls*, May 8, 2012, www.shrimppalliance.com/new/?p=1836.

⁸⁵ *Settlement Will Help Prevent Sea Turtles From Drowning in Fishing Nets*, Center for Biological Diversity, May 8, 2012, http://www.biologicaldiversity.org/news/press_releases/2012/sea-turtles-05-08-2012.html.

⁸⁶ *NOAA Assesses Civil Penalties to Shrimpers for Alleged Turtle Excluder Device Violations*, NOAA NEWS, Nov. 3, 2011, www.noaa.gov/stories/2011/2011110311_ole_teds.html

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Sea Turtle Conservation; Shrimp Trawling Requirements, 77 Fed. Reg. 27411 (proposed May 10, 2012).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Sea Turtle Conservation; Shrimp Trawling Requirements; Withdrawal, 78 Fed. Reg. 9024 (Feb. 7, 2013) (codified in 50 C.F.R. Part 223).

⁹⁵ *Id.*

⁹⁶ *Id.* at 9025.

⁹⁷ *Id.* at 9026.

⁹⁸ *Id.* at 9024.

⁹⁹ *Id.* at 9025.

¹⁰⁰ *Id.* at 9026.

¹⁰¹ 50 C.F.R. § 424.11(d)(2).

¹⁰² *Bi-National Recovery Plan*, *supra* note 25, at vi.

¹⁰³ 50 C.F.R. § 424.10.

¹⁰⁴ 50 C.F.R. § 424.11.

¹⁰⁵ 50 C.F.R. § 424.13.

¹⁰⁶ *Bi-National Recovery Plan*, *supra* note 25, at vi.

¹⁰⁷ W.N. Witzell et al., *Nesting Success of Kemp's Ridley Sea Turtles, *Lepidochelys kempi*, at Rancho Nuevo, Tamaulipas, Mexico, 1982-2004*, 69 (1-4) MARINE FISHERIES REV. 46, 46.

¹⁰⁸ *Id.*

¹⁰⁹ *Bi-National Recovery Plan*, *supra* note 25, at I-30.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at I-31 (citing personal communication with D. Shaver, PAIS (2010)).

¹¹⁴ *Id.* at I-31.

¹¹⁵ *Bi-National Recovery Plan*, *supra* note 25, at I-22.

¹¹⁶ *Id.* at I-23-I-24.

¹¹⁷ *Id.* at I-25.

¹¹⁸ *Id.* at II-2.

¹¹⁹ *Id.*

¹²⁰ *Id.* at II-3.

¹²¹ *Id.* at II-1.

¹²² *Id.* at x.

¹²³ *Strandings*, *supra* note 1.

Free Handbook Shows Homeowners How to Prepare for Hazards

South Louisiana has reached what is usually the most active months of hurricane season, and now is the time for homeowners to make sure they have taken necessary preparations to protect their homes and loved ones. Through the new Louisiana Homeowners Handbook to Prepare for Natural Hazards, residents of Louisiana have a useful resource at their fingertips as they ready their families for natural disasters.

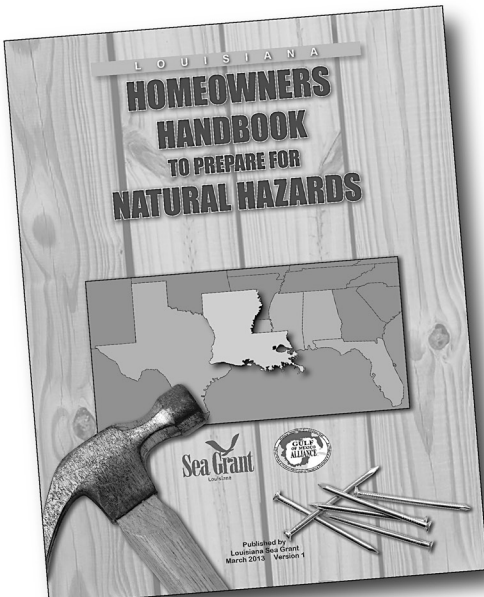
The handbook explains the forces of nature that act on structures during storms, including the dangers associated with high winds, heavy rain and storm surge. It further lays out ways to gird a home against these forces to minimize or negate their effects, as well as information on how to reduce the human toll exacted by dangerous storms.

“There are tips and information specific to Louisiana residents for preparing evacuation plans and kits, construction practices, retrofitting, shutter styles, insurance information and emergency contact numbers. Basically everything a homeowner needs to know in coastal Louisiana to be best prepared for coastal hazards,” said Melissa Daigle, resiliency specialist with Louisiana Sea Grant. The handbook also addresses concerns related to other hazards, including tornados and flood events.

The handbook is available in PDF format at www.lsu.edu/slegal/pubs/handbook.htm as a free download. Free hard copies will be available at various locations throughout coastal parishes, or the book can be ordered for \$5 – to cover postage and handling – by emailing Jessica Schexnayder at jsche15@lsu.edu.




Louisiana Sea Grant produced the handbook with the help of other state, regional and national organizations, and has printed 13,000 copies for distribution. The handbook was funded through a program of the Gulf of Mexico Alliance (GOMA) that aims to see each Gulf state prepare its own guidelines for coastal residents in their state. With recent storms – including Hurricanes Katrina and Rita in 2005, Hurricane Gustav in 2008, and the Mississippi River flooding in 2011 – being among the worst in memory, preparing beforehand for a natural hazard has become even more important for residents of vulnerable areas.

“All five Gulf states now have a Homeowners Handbook that is tailored to the needs of their residents,” said Daigle. “The goal of the project is to help build a more resilient coast by getting important information into the hands of homeowners along Louisiana’s coast.”



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ANNOUNCEMENTS

In the tri-parish region of Vermilion Bay, the Twin Parish Port District (Port) is the recipient of a \$35,000 grant from the FEMA 2012 Community Resilience Innovation Challenge program (www.resiliencechallenge.org). This program, managed through the Los Angeles Emergency Preparedness Foundation, aims to identify and support best practices to strengthen community resilience. The Port, in conjunction with Louisiana Sea Grant, has proposed to develop a “harbor of refuge” communication plan between commercial fishing vessels and ports in St. Mary, Iberia, and Vermilion parishes. Currently, no official plan exists for tying down vessels to protect them from storm damage and to prevent them from becoming water-borne debris during a storm. Fishing vessels, charter boats, transient boats and offshore vessels all compete for space in local waterways when a hurricane is in the forecast. The proposed project is to assess the number and size of commercial and charter fishing vessels needing harbor of refuge space; to develop a long-term communication plan between vessel operators, ports, and offices of emergency preparedness; and to develop a virtual “parking lot” for vessels with maps of recommended locations for

vessel tie down sites. Overall, this project contributes to community resiliency by organizing a plan for vessels to moor during a storm, ensuring that those vessels remain and sustain little damage. For more information on the project, contact Lauren Land, Sustainability Coordinator at Louisiana Sea Grant, at llandl@lsu.edu.

LCL E-mail Update Service

The Louisiana Sea Grant Legal Program disseminates an e-mail/web-based update to our biannual newsletter four times a year. These updates cover environmental law news relevant to the LSL’s audience, summaries of recently introduced environmental legislation and regulations and recent court decisions. To subscribe to the LCL E-mail Update Service, send an e-mail to mtrosc2@tigers.lsu.edu.

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