

WATER LOG



A Legal Reporter of the
Mississippi-Alabama Sea Grant Consortium

Contents

- Casino Gambling and Tidelands Leasing in Mississippi
— Margaret Anne Bretz
- Administrative Agencies: An Overview for Citizens
— Greg Glover

Plus . . .

- Case Brief: *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992)

And more . . .

Volume 12, Number 4, 1992
Mississippi-Alabama Sea Grant Legal Program

WATER LOG

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

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This work is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce under Grant Number NA16RG0155-02, the Mississippi-Alabama Sea Grant Consortium, the State of Mississippi, and the University of Mississippi Law Center. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. The views expressed herein are those of the author(s) and do not necessarily reflect the views of NOAA or any of its sub-agencies.

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MASGP-92-014-04

This publication is printed on recycled paper

Casino Gambling and Tidelands Leasing in Mississippi

by Margaret Anne Bretz

INTRODUCTION

The tidelands leasing program administered by the Secretary of State, trustee for the public trust tidelands, has expanded to accommodate the Coast's newest industry, dockside gambling. Although the dispute concerning ownership of filled tidelands continues (*State v. Byrd*, No. 90-CA-0692 was argued before the Mississippi Supreme Court on 30 November 1992) and the leasing of those properties has consequently been deferred, public ownership of lands naturally subject to the ebb and flow of the tide was settled in 1988 by *Phillips Petroleum*, 484 U.S. 469. Following that decision, Secretary of State Dick Molpus implemented a tidelands management program incorporating recommendations of a Blue Ribbon Commission composed of coast residents. Tidelands leasing, an integral part of that program, is accomplished through coordination with the Bureau of Marine Resources. The Secretary of State reviews applications to the Bureau of Marine Resources for wetlands permits, and notifies both the Bureau and the applicant if the proposed activities require a tidelands lease.

As of December 1992, six applications by prospective casino operators had been made, and two leases had been executed. With one exception, all applications were for sites in Biloxi in eastern Harrison County. The sixth site is in Hancock County, which is the only other Mississippi coastal county to legalize casinos. Although it is expected that several casino sites will be leased by the Secretary of State, he is by no means the only potential landlord. Other state and local governmental agencies, including the Biloxi Port Commission and the State Port Authority at Gulfport, have executed leases for tidelands within their jurisdiction. And in Hancock County, the first casino to open operates in a man-made harbor; public ownership of that tidally affected site is not an issue.

DISCUSSION

The Secretary of State's rules for the administration, control and leasing of public trust tidelands provide that rent shall be negotiable, but in no event less than \$0.07 per square

foot for submerged lands and tidelands. In some instances the lowest permissible rent could be considered a donation of public trust property, which is prohibited by the Mississippi constitution and is a breach of the public trust doctrine. To ensure a fair rent for casino operators and at the same time secure adequate compensation for the public, the Secretary obtains an independent appraisal of fair market rental for the tidelands which will be effectively occupied by the casino operation. The applicant is subsequently offered the lease for the annual fair market rental as determined by that site-specific appraisal.

Revenues from tidelands leases comprise the Public Trust Tidelands Fund and are used, after administrative costs, to replace lost tax revenues; the remainder is disbursed to the Bureau of Marine Resources for new programs of tidelands management, including conservation, reclamation, preservation, acquisition, education, enhancement of public access, and public improvement projects relative to tidelands. Because the leases which have been executed do not involve contested (i.e. filled) properties, which are on the assessor's land rolls, it has not been necessary that any portion of the Tidelands Fund be used to defray lost tax revenues. The revenues disbursed to the Bureau of Marine Resources will be sufficient to fund significant new tidelands programs.

In order to preserve the traditional recreational nature of the coast's publicly funded sand beaches, the Secretary of State's leasing policy precludes commercial leasing in adjacent waters. This naturally restricts to some extent the sites available for gaming. Additionally, any tidelands lessee must comply with applicable zoning regulations and must obtain necessary wetlands permits from the Bureau of Marine Resources.

Although the maximum statutory tidelands lease term is 40 years, casino leases have been limited to 10-year terms with an optional 5-year renewal term. Statutorily mandated rent review and adjustment takes place midterm, and rent is renegotiated prior to the renewal term if that option is exercised. Public access is assured, indemnity and hold harmless clauses are required, and minimum liability insurance limits of \$5 million are prescribed.

In the lease of what is known as the Broadwater site, special public access provisions were negotiated because of the historic use of the area for recreation and fishing. Although the leased property includes only the marina basin, restrictions on the use of the surrounding filled area are in place. A compromise was reached which allowed for parking lot development but retained a portion of the site as open space. Displaced fishermen should soon find a new fishing pier adjacent to the site.

CONCLUSION

The tidelands are one of Mississippi's greatest natural assets. They are a dynamic asset, however, and are subject to increasing demands for an increasing variety of uses. Gaming is but the latest. It is therefore critical for Mississippi to maintain an active, effective tidelands management program to protect this asset into the 21st century. □

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The views expressed in this article are those of the author and do not necessarily represent the view of the editors or the Mississippi-Alabama Sea Grant Consortium.

Administrative Agencies: An Overview for Citizens

by Greg Glover

INTRODUCTION

Environmental law is an area of the law that is highly regulatory in nature, meaning that federal, state, and local agencies play a major role in the development, implementation, and enforcement of this very technical and complicated branch of the law. In the first half of this century, particularly during the New Deal era, government began reaching into more and more sectors of the national economy. It soon became clear that the legislature could not maintain adequate supervision of the regulatory process because it lacked the requisite time, manpower, and expertise. Thus administrative agencies were created, their mission being to provide specialized regulation of particular areas as authorized by Congress. Since regulation of the environment is largely controlled by administrative law, it would be useful for those with an interest in this field to have an understanding of how agencies are created and how citizens may participate in the formulation of regulations. This article will provide an overview of that process at the federal level.

The Administrative Procedure Act

To create an agency, Congress passes a statute which typically includes a statement of congressional purpose, a skeleton outline of the regulatory scheme, authorization for an administrative agency to carry out the regulatory program, and provisions relating to enforcement of the statute. It is this "organic statute" that sets forth the congressional mandate for how the agency is to pursue the mission with which it is entrusted. The agency, once established, has the responsibility for promulgating rules pursuant to its mandate from Congress; after this "rulemaking" process is completed these rules become law and are enforceable as such.

When administrative agencies began to proliferate during the Great Depression and the Second World War, a conflicting mass of procedural rules, utterly lacking in uniformity, grew up around them. In order to allow citizens to familiarize themselves with only one set of rules for dealing with any federal agency, Congress in 1946 passed the Administrative Procedure Act (APA), 5 U.S.C.A. §§ 551 *et seq.* (West 1977 and Supp. 1992). The APA establishes

a single system of the bare procedural requirements that every agency must meet in formulating its rules.

Rulemaking is the process for enacting a rule, which is an agency's statement of general or particular applicability and future effect designed to implement law or policy (APA § 553). Rulemaking is divided into two main categories, formal and informal. A third kind, hybrid rulemaking, has come into increasing favor of late.

Formal Rulemaking

Formal rulemaking is an exhaustive process. Section 553(c) provides that formal procedures must be followed when a statute (usually the statute granting regulatory power to the agency) requires rules to be made on the record after an opportunity for an hearing. While the statute need not declare that the rule must be made on the record after an opportunity for a hearing, there must be a clear expression of congressional intent that formal rulemaking procedures be complied with.

A formal proceeding is presided over by a member of the agency or an administrative law judge. The agency which is the proponent of the rule has the burden of proving the need for the rule, and any oral or documentary evidence may be received into evidence, unless the agency as a matter of policy deems the evidence to be irrelevant, immaterial, or unduly repetitious. A party may make out his case by presenting oral or documentary evidence, by submitting rebuttal evidence, and by conducting cross-examination as is required for a complete understanding of the facts. The transcript of the testimony and any exhibits introduced, including all papers and requests filed in the proceedings, constitutes the exclusive record upon which a decision is based, and a copy is made available to the parties. If the agency itself does not preside over the hearing proceedings, the presiding officer will initially decide the case unless the agency directs that the entire record be submitted to it for certification. This initial decision becomes the decision of the agency except where an appeal is made to the agency within the time specified in the rule.

On appeal, the agency has all the powers it would have had if it had presided over the initial decision. The agency may issue a tentative decision, or it may forgo this step if the agency determines on the record that this process will inhibit the timely execution of the rule. Prior to the issuance of an initial, tentative, or appellate decision, the parties must be given the opportunity to present to the presiding officer any proposed findings and conclusions, any exceptions to any previous decisions, and reasons

supporting these contentions. The record includes the ruling on each finding, conclusion, or exception that is presented. In addition, the record will include all decisions of any form, a statement including any findings made, the reasons for these findings on all material issues of fact, law, or discretion, and any appropriate rules or orders.

It is very important that an interested party not attempt to communicate *ex parte* (i.e., outside the legal forum provided) with the presiding officer in the matter. If such direct communication takes place, the substance of it will be placed upon the public record. The presiding officer will further require the party to show cause why his claim or interest should not be dismissed, denied, or disregarded.

While formal rulemaking provides a thorough review of all aspects of a proposed rule, it is a cumbersome, time-consuming, and expensive process. Many feel that the costs outweigh the good that formal rulemaking offers, and the courts will not require formal rulemaking procedures unless the statute expressly requires it.

Informal Rulemaking

Informal rulemaking, also referred to as "notice-and-comment" rulemaking, is the simplest form of rulemaking and applies whenever the agency promulgates substantive rules. Section 553 sets forth only three requirements for informal rulemaking. First, the agency must give prior notice of the rule by publication of the proposed rule in the Federal Register, unless the persons who will be affected by the rule already have actual knowledge of the proposed rule. However, agencies seldom rely on actual notice, preferring instead to publish notice in the Federal Register. Included in the notice is a statement of the time, place, and nature of any public rulemaking procedures, a reference to the agency's legal authority to issue the rule (usually a reference to a statute), and either the text of the rule or a description of the subjects of the rule.

Second, after notice is published the agency must give any "interested person" at least 30 days to submit written views, data, or arguments with or without an oral presentation. Third, following this comment period the agency must consider the comments received and must include in the adopted rule a "concise general statement of their basis and purpose." While the extent of "concise and general" has yet to be defined, it is less than is required in formal rulemaking procedures.

Informal rulemaking is a very efficient method of informing the public of impending rule changes, but it provides little recourse to a person who wishes to contest a proposed rule. No public adversarial hearings are required,

nor must the agency articulate the reasons for its decisions or reveal the evidence upon which the agency relied in passing of the rule. In particular, the fact that no public hearing need be held means that informal rulemaking may produce a misguided or uninformed decision.

Hybrid Rulemaking

Formal rulemaking, except in matters of gravest import, is far too unwieldy, while informal rulemaking gives interested persons very few rights to learn about and contest the basis of a rule. These problems have spawned "hybrid rulemaking." Hybrid rulemaking uses intermediate procedures that permit effective public participation while avoiding the time and expense of full-blown adversarial hearings. These procedures have no set rules. The courts have stated that the APA sets forth only the minimum procedural requirements an agency must follow. If an agency is not required by statute to engage in formal procedures but wishes to hold a hearing of some sort, then the hearing held need not conform to those described in the APA.

The common law surrounding hybrid procedures is wide and varied, not lending itself to simple characterization. The common thread uniting all these cases is that courts will uphold mixed procedures so long as they meet the APA's minimum standards. Nothing in the APA prevents an agency from granting greater opportunities to participate than are mandated by statute. If an agency desires to provide more generous procedure than required, it will not be penalized when those procedures are not as thorough as formal rulemaking procedures.

It must be noted that the APA sets out some exceptions in section 553 to the necessity of notice and comment when promulgating a rule. Rules which involve military or foreign affairs functions, or matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts are exempt from notice and comment procedures. Also exempt are rules which are merely interpretive in nature, general statements of policy, rules of agency organization, procedure, or practice, and rules promulgated under circumstances where the agency determines with good cause that such procedures are "impracticable, unnecessary, or contrary to the public interest." The burden is on the proponent agency to make this "good cause" finding and include a brief statement explaining the omission of public participation in promulgating a rule. This finding is subject to judicial review, and the rule may be set aside if a court finds that the agency lacked sufficient justification for preventing the public from participating.

Adjudicatory Proceedings

The APA provides the requirements for adjudicatory proceedings as well as rulemaking. Adjudication is defined as the process for the formulation of an order. An order is defined as a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing (§§ 551(6)-(7)). Therefore it follows that adjudication is a residual category, encompassing all things that are not comprised in rulemaking. Section 554 sets out the procedure to be followed in all adjudications which must be determined on the record after opportunity for agency hearing. There are some exceptions to these requirements, including when the issues involved are matters that are subject to a trial of the facts and of the law *de novo* in a court, which means that the court will decide these issues as if there had not been any previous decision whatsoever on these issues. Other exceptions cover the selection or tenure of an employee; proceedings in which the decision rests solely on inspections, tests, or elections; when military or foreign affairs are involved; in situations where the agency is acting as an agent of the court; and in matters concerning the certification of worker representatives.

All those who are entitled to notice of the hearing shall be notified of the time, place, and nature of the hearing, the legal authority and jurisdiction under which the hearing will be held, and the matters of fact and law asserted. When the moving party is a private person, whether that person be an individual, partnership, corporation, or association, other parties to the proceeding must promptly notify the movant of any issues controverted in fact or law. When the agency selects a time and place for the hearing, it must take into account the convenience of the parties.

All interested parties are given the opportunity to present and have considered any facts, arguments, settlement offers, or proposals of adjustment. If the parties are unable to resolve the disputes, a hearing as described above will be held to determine the controversy. The prohibition against *ex parte* communication also obtains in adjudicatory proceedings. The hearings required in both formal rulemaking and adjudicatory proceedings are substantially the same, and the resulting decisions of each are subject to supervision by the courts in the form of judicial review.

Judicial Review

So long as the agency has fulfilled the procedural requirements mandated by law, the courts accord an agency a great deal of discretion in its decisions, largely because the court

lacks the expertise in technical matters possessed by the agency. Federal agencies are also granted this discretion as a simple matter of judicial economy. Otherwise, the courts would be clogged with cases concerning agency decisions.

Any person who has suffered a legal wrong or has been adversely affected or aggrieved due to an agency action is entitled to judicial review of the action. Although a legal action, with the exception of a suit for money damages, which arises as a result of the action or inaction of an agency or one of its members cannot be dismissed simply because the United States is the defendant or is an indispensable party to the action, there will be no review if the statute precludes judicial review or when the agency action is committed to agency discretion. Any mandatory or injunctive decree entered against the United States as defendant must include those federal officers and their successors in office who were personally responsible for compliance with the decree.

If the statute under which the agency finds its authority to take the offending action specifies the form of proceeding for judicial review, the complaining party must follow the mandates of the statute. Decisions that have been committed to agency discretion normally include those in which the administrator of the statute acts in a managerial capacity, exercising continuous supervisory powers over a series of small decisions that must be based on such intangibles as instinct and good sense.

If the statute lacks a provision concerning the manner of judicial review, any applicable form of legal action may be brought in a court of competent jurisdiction against the United States, the agency, or the officer of the agency responsible for the action. However, such an action will not be entertained by the courts unless the movant has exhausted all possible administrative remedies as provided in the agency's organic statute.

Agency actions which are made reviewable by statute and final agency actions for which there is no other adequate remedy in court are subject to judicial review. Preliminary, procedural, or intermediate actions are not subject to review until the final agency action itself is reviewed. Agency action is considered final even if there has not been a declaratory order issued, unless the agency requires the rule to be inoperative pending an appeal to a superior agency authority. An agency may, if justice requires, delay the effective date of an action pending judicial review, in order to prevent irreparable injury as a result of its actions.

The reviewing court will be responsible for deciding all relevant questions of law, interpreting constitutional and statutory provisions, and determining the meaning or appli-

cability of the terms of an agency action. The APA sets forth six different standards of proof to which an agency will be held. In most circumstances, the agency will be given a great deal of discretion in its actions. In reviewing any action, the court will review the whole record of the administrative proceedings and will take account of any prejudicial error. It is this provision that points up the importance of formal and informal administrative proceedings. In formal proceedings, the record of the action is much more complete than that of informal proceedings, and there must also be a more detailed explanation of the action taken by the agency and the bases upon which the action was taken.

Mississippi's Administrative Procedures

Mississippi's Administrative Procedure Act (MAPA), Miss. Code Ann. § 25-43-1 *et seq.* (1972) places a great deal of importance on the individual agency's organic statute. According to MAPA, state agencies are given the authority to determine their own procedures for both formal and informal decision-making. While the statute sets forth a 30-day notice and comment period, it includes little other substantive procedure. There is a provision that state agencies submit all rules to the Secretary of State's office and maintain a compilation of all rules in effect with that office. Rules that are not submitted to the Secretary's office are deemed not to have taken effect. However, state agencies have historically ignored this provision of the law, and Secretary of State Dick Molpus is in the process of forcing compliance with this law.

The MAPA allows state agencies to operate with little or no accountability to the public which they are intended to serve. An equally large problem is the utter lack of uniformity of procedure among the state agencies. Looking at the MAPA serves no real purpose and the resulting complexities of dealing with state agencies could deter public participation in their decisions. Mississippi should rethink its approach to administrative procedure and bring that branch of the government into a position where it may be used by the citizens of the state.

CONCLUSION

Administrative procedure is a daunting subject. There is a bewildering number of agencies which deal with a wide variety of issues on a daily basis. In order to facilitate participation in the process, Congress saw the need for uniformity of procedures and passed the APA. The APA gives

the individual citizen sufficient understanding to allow him to take part in agency decisions. It mandates the minimum procedural standards that each agency must meet when taking administrative action.

The organic statute of the particular agency is important for an understanding of how an agency conducts its business. It provides the statutory authority of the agency and the general mission of the agency. The final place an individual should turn is to the particular statute that provides the regulatory authority to take the action. These three sources should arm the citizen with all the information he needs to take part in the administrative action. While the type of proceeding dictates the amount of impact citizen participation will have on the agency decision, an agency may not exclude the public altogether. If the public allows itself to be discouraged from taking part in the administrative process, agencies cease to provide those services that are useful to the public because government will not be fully aware of the need. □

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The views expressed in this article are those of the author and do not necessarily represent the view of the editors or the Mississippi-Alabama Sea Grant Consortium.

Reahard v. Lee County

968 F.2d 1131 (11th Cir. 1992)

by John Farrow Matlock

On 14 August 1992, the United States Court of Appeals for the Eleventh Circuit overturned a magistrate's ruling that a county's land use plan constituted a "taking" for which the county must pay just compensation.

INTRODUCTION

In November 1984 Richard Reahard inherited a 40-acre tract of land in Lee County, Florida, that he and his wife wished to develop into a residential subdivision. In December of that year the Lee County Comprehensive Land Use Plan went into effect, under which the Reahards' land was classified as a Resource Protection Area (i.e., wetland) and thereby limited to development for a single dwelling. The Reahards filed suit in state court in 1989, alleging that the implementation of the land use plan was a valid exercise of the county's police power but claiming that the county must render them just compensation for the value of the property. The action was removed to federal court, where the parties agreed to have the case tried before a magistrate judge.

A number of witnesses were called, including Reahard, land use experts, and property appraisers, as well as officials of Lee County, the Florida Department of Environmental Regulation, and the Army Corps of Engineers. The evidence introduced went to the property's history of subdivision, sale, and development (Reahard's father had acquired the land in 1944 as part of a much larger parcel that he later subdivided and sold over the years); the site's history of zoning and regulation; appraisals of value after the land use plan took effect; development of similar wetland areas; and the Reahards' investment expectations. In deciding the matter, the magistrate wrote simply that "as a result of the adoption of the Lee Plan, there was substantial deprivation of the value of plaintiffs' property resulting in a taking of plaintiffs' property." A jury impanelled to ascertain the Reahard's damages awarded them \$700,000 with interest from December 1984; the final judgment ordered the Reahards to deed the land to Lee County. Lee County appealed. The Circuit Court reversed, holding that the magistrate applied the wrong legal standard governing partial takings and that the magistrate's finding of facts was inadequate to support his conclusion that there had been a taking.

ANALYSIS

The court awaited the decision of the United States Supreme Court in the then-pending case of *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), before taking up the present case. (For a discussion of that case, see WATER LOG vol. 12, no. 2 (1992).) The court observed that the Supreme Court has never articulated a single standard to use in takings cases but has instead proceeded in the main on a case-by-case basis. In addressing a takings claim, a court must first determine whether the regulation advances a legitimate state interest. A court must then decide whether the regulation denies an owner of any practical economic use of his property. Once the validity of the regulation has been established, a court must examine the economic effect of the regulation on the property-owner and the extent to which the regulation destroyed the owner's expectations of return on his investment. The Circuit Court remarked that the Supreme Court's holding in *Lucas* in fact had no bearing on the outcome of this case, since the high court there laid down no rule about compensation when a regulation renders only part of a landowner's property unusable. The Circuit Court held that on remand the district court should support its decision with reference to such facts as how and for what purposes the property was originally acquired; how the property was developed for use subsequent to its acquisition; how zoning and other regulations limited use of the land over the years; what were the reasonable expectations of the landowner and neighboring landowners under state law; and, most important, what was the diminution in the investment-backed expectations of the landowner after the enactment of the regulation.

CONCLUSION

This case is among the first decided in the wake of *Lucas v. South Carolina Coastal Council*. The circuit court's decision did not turn on the holding in *Lucas* only because of the insufficiency of the magistrate's findings on threshold questions of fact. *Lucas*, whatever the questions about "partial takings" it left unresolved, will mean that more and more cases like this one will be settled in favor of landowners and their property rights, thereby increasing the costs of coastal preservation and forcing coastal managers to choose their battles more carefully than in the past. □

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LAGNIAPPE

A Little Something Extra

On 20 November 1992, the South Carolina Supreme Court held that compensation was due for a "temporary taking" of property by the South Carolina Coastal Council's enforcement of the state's Beachfront Management Act. In the original case of *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), a landowner who was refused a building permit by the state's coastal management commission sued the state demanding just compensation for his property under the fifth amendment. South Carolina's high court held that no compensation was owed because the state's Beachfront Management Act, under the terms of which the permit was denied, was enacted to prevent a great public harm (namely the destruction of coastal lands). (For a discussion of the opinion of the South Carolina court, see WATER LOG vol. 10, no. 4 (1990).) Lucas appealed to the United States Supreme Court.

The U.S. Supreme Court reversed that decision and remanded the case to the Supreme Court of South Carolina (for a discussion of the Supreme Court's opinion, see WATER LOG vol. 12, no. 2 (1992)) for that court to determine whether background principles of the state's nuisance or property law provided an exception from the constitutional requirement that compensation be paid where governmental regulation denies an owner all economically valuable use of his land. The South Carolina Court found that no common-law basis existed by which the state could restrain Lucas' desired use of his land. On the question of damages, the court granted leave to the parties to present evidence of the damages Lucas sustained "as a result of the state's non-acquisitory taking of his property without just compensation" for the period extending from the enactment of the Beachfront Management Act in 1988 to the rendition of the order by the state supreme court in November 1992.

On 2 November, Secretary of the Interior Manuel Lujan announced a plan for restoring wetlands under which 1.3 million acres of wetlands would be improved or restored by 1995 and 10 million acres by 2010. A report by the Interagency Committee on Wetlands Restoration and Creation called for the establishment of a National Council for Wetlands Restoration and Creation, made up of representatives of federal agencies, state governments, and private

interests, to oversee the program. Actions taken during the Bush administration saw the restoration or enhancement of 900,000 acres of wetlands.

Meanwhile, controversy continues to swirl around changes to the wetlands delineation manual that were proposed by the Bush administration in August 1991. The administration recommended the adoption of a revised manual that would have substantially narrowed the definitions used in the 1987 manual, which some citizens claimed would remove as much as half the country's remaining wetlands from federal protection. EPA received 80,000 public comments about the proposed manual, most of them negative. The 1991 manual has never been implemented, and it is widely believed that the incoming administration will announce a return to the 1987 manual sometime early in 1993. (For a discussion of federal wetlands policy, see WATER LOG vol. 11, no. 2 (1991).)

Thirteen landowners in Alabama and Mississippi filed a lawsuit in a state court in Jackson, Mississippi against Weyerhaeuser Co. on 2 November, claiming that the company had discharged dioxin and other toxins from its Columbus Pulp and Paper Mill into the Tombigbee River. The plaintiffs are seeking one billion dollars in damages.