Volume 26, Number 2
August 2006

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Fifth Circuit Rejects Challenge to LNG License

***Gulf Restoration Network v. U.S. Dept. of Transp.*, 2006 WL 1549953 (5th Cir. June 8, 2006)**

Josh Clemons

In June the U.S. Court of Appeals for the Fifth Circuit rejected a petition by two environmental groups and a charter boat organization to review the U.S. Secretary of Transportation's decision to grant a license for construction of a liquefied natural gas (LNG) facility in the Gulf of Mexico. The Secretary's decision stands.

Background

In November of 2003 Gulf Landing LLC, a wholly-owned subsidiary of Shell Oil, filed an application with the Secretary of Transportation under the Deepwater Port Act for the necessary licenses and federal authorizations to construct, own and operate a deepwater port thirty-eight miles off the coast of Louisiana. The facility would take natural gas that has been liquefied by low temperatures for transportation by ship, re-gasify it with heat, and deliver it to existing natural gas pipelines.

One feature of the proposed LNG facility proved controversial, ultimately leading to this lawsuit: Gulf Landing chose to use an "open loop" system to provide the heat for re-gasification. The open loop system sucks warm water from the Gulf and directs it to flow over panels that contain tubes that contain LNG, which is re-gasified. This process requires very large volumes of seawater – billions of gallons a day, for some facilities - and adversely affects marine creatures by entrapping them in intake screens, changing water temperature, and releasing harmful anti-biofouling agents into the surrounding water. According to scientists, virtually all sea creatures that are sucked into an open loop system are killed. Among the species at risk would be commercially and recreationally valuable fish like snapper and redfish, as well as the smaller creatures upon which they feed. The court noted that the red drum, a popular sport fish, is of "particular concern" and that the proposed facility could destroy nearly four percent of Louisiana's annual harvest of that species.[1]

The site of the proposed LNG facility is located in an area described by the National Marine Fisheries Service (NMFS) as the "'fertile fisheries crescent,' the most biologically productive area in the Gulf of Mexico marine ecosystem."[2]

The alternative to the open loop system is called, unsurprisingly, the closed loop system. The closed loop system does not rely on cycling through vast quantities of naturally warm seawater. Rather, a much smaller vol-

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ume of water is heated by natural gas and re-used. The heating process consumes approximately 1.5 percent of the natural gas the facility receives, which can cost the operator annual dollar amounts in the tens of millions. For obvious financial reasons, facility owners prefer open loop systems; however, closed loop systems are successfully utilized at most onshore LNG terminals.

Because the Secretary's decision whether or not to permit an LNG facility is a major federal action that can significantly affect the human environment, it is subject to analysis under the National Environmental Policy Act (NEPA).[3] The analysis is recorded in an Environmental Impact Statement, which describes, among other things, adverse environmental impacts of the proposed federal action and alternative actions. The purpose of the NEPA EIS process is to inform the public, which has opportunities to comment, and provide the agency with the information necessary to make an informed decision.

NEPA requires consideration of not only the single project at hand, but also of the cumulative effects of "reasonably foreseeable future actions."[4] At the time the EIS was being prepared there were five pending applications for LNG facilities in the Gulf. The Secretary considered only two of them in the EIS, on the grounds that the other three were too speculative. NMFS advised the Secretary that the EIS would not be adequate if the cumulative impacts from all five facilities were not addressed, and that the open loop system would be more environmentally responsible. Nonetheless, the Secretary approved the Gulf Landing license application.

Gulf Restoration Network, the Sierra Club, and the Louisiana Charter Boat Association petitioned the Fifth Circuit under the Administrative Procedure Act, which allows private parties to seek judicial review of federal agency actions. Reviewing courts can set aside such actions if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[5] The plaintiffs alleged that it was arbitrary and capricious for the Secretary to approve the license application when (1) only two of the five pending LNG applications were considered in the cumulative impacts portion of the EIS, and (2) the facility would use the less environmentally responsible open loop system when a better system was readily available.

The Fifth Circuit's Analysis

The Fifth Circuit uses three factors when testing the adequacy of NEPA analysis: "(1) whether the agency in good faith objectively has taken a hard look at the environmental consequences of a proposed action and alternatives; (2) whether the EIS provides detail sufficient to allow those who did not participate in its preparation to understand and consider the pertinent environmental influences involved; and (3) whether the EIS explanation of alternatives is sufficient to permit a reasoned choice among different courses of action."[6] The court asserted that it should be deferential to agency expertise.

The first issue to come under the court's microscope was the agency's cumulative impacts analysis. The court proclaimed that a possible future impact should be considered if it is reasonably foreseeable, which is the case if the impact is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[7]

In considering the five facilities for which applications had been filed, the Secretary's criterion for reasonable foreseeability was whether a draft EIS had been prepared. Because only two facilities had reached that point, the Secretary included the cumulative impacts of only those two. The Secretary's rationale for this line-drawing was that a project is not sufficiently certain to be constructed until it has advanced beyond the application stage into the NEPA process. The plaintiffs argued that the Secretary was being arbitrary and capricious because the applications contained sufficient

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Sea Grant

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

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Federal Circuit Allows Louisiana Takings Claim to Advance

***Northwest La. Fish & Game Preserve Commn. v. U.S.*, 446 F.3d 1285 (Fed. Cir. 2006)**

Josh Clemons

In May the U.S. Court of Appeals for the Federal Circuit reversed a decision by the Court of Federal Claims, thereby allowing a takings claim by a Louisiana state agency against the U.S. Army Corps of Engineers to proceed.

Background

At the heart of this case is Louisiana's Northwest Fish and Game Preserve, a sanctuary for fish and wildlife that also provides recreational opportunities. The Preserve, which is managed by the Northwest Louisiana Fish and Game Preserve Commission (Commission), includes a pair of lakes referred to collectively as Black Lake. Black Lake is vulnerable to overgrowth of aquatic weeds, which the Commission attempts to control by drawing down lake levels into the Red River.

The Red River is of interest to the U.S. Army Corps of Engineers (Corps). In 1968 Congress authorized the Corps to construct the Red River Project (Project) to ensure the river's year-round navigability. The Project consists of a series of locks and dams. Lock and Dam 3 (L&D 3) impounds water in Pool 3, which the Corps has maintained since 1994 at an elevation of ninety-five feet above mean sea level (95 MSL). Pool 3 directly limits the drawdown potential of Black Lake, the elevation of which is approximately 99.5 feet above mean sea level. The Commission contends that it needs to be able to draw down Black Lake to approximately 88.5 feet to control aquatic weeds. The elevation of Pool 3 allows a drawdown only to ninety-five feet.

In the late 1980s and early 1990s the Corps conducted studies of aquatic vegetation and the effect Pool 3 would have on Black Lake. The studies focused primarily on the invasive and highly troublesome water hyacinth. Hydrilla, a submerged weed, was not considered to be a potential problem and thus was not part of the studies.

In the fall of 1996, almost two years after Pool 3 reached 95 MSL, hydrilla was recognized as a growing problem in Black Lake. The Commission asked the Red River Waterway Commission (RRWC), a state entity that assisted the Corps with Project operations, if there was a chance that Pool 3 could be lowered to allow Black Lake to be drawn down enough to kill the hydrilla. The RRWC passed the request along to the Corps, which denied it in January 1997. There would be no drawdown, and the hydrilla would continue to infest Black Lake.

In February 1997 the Commission sued the RRWC in federal court for land appropriation and/or inverse condemnation. The RRWC brought in the Corps as a defendant. Because the Corps bore actual responsibility for the elevation of Pool 3, the court allowed the RRWC to withdraw from the case.

In December 2000 the Commission began an administrative action against the Corps, seeking $30 million for various damages associated with Pool 3, including the hydrilla problem, that had occurred since January 1995. Nothing came of this administrative action.

In July 2001 the Commission sued the Corps under the Federal Tort Claims Act (FTCA)[1] and the Fifth Amendment of the U.S. Constitution, which forbids the government from taking property without paying just compensation. The Commission alleged that the Corps' actions had prevented it from effectively managing the Preserve, and that fixing the problems would cost approximately $26 million. The district court dismissed the FTCA claim because it determined that the claim had accrued by January 1997, and there is a two-year statute of limitations on tort claims against the federal government.[2] The takings claim, which had a six-year limitation period, was transferred to the Court of Federal Claims.

The Court of Federal Claims dismissed the takings claim because it determined that the cause of action accrued when Pool 3's 95 MSL elevation was reached in December 1994, more than six years before the Commission filed suit. The Commission appealed this dismissal to the U.S. Court of Appeals for the Federal Circuit.

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The Appeals Court's Decision

The only issue on appeal was whether the lower court had correctly determined the date by which the Commission's claim accrued. Had the claim actually accrued within the six-year period prior to July 5, 2001, when the Commission filed suit?

The court began its analysis by reviewing the characteristics of a taking. Simply put, a taking occurs when the government deprives a property owner of all or most of a property interest without compensation. Several courts have found takings to have occurred when lands were flooded by the operation of public works projects.

When analyzing a takings claim it is necessary first to clearly identify what property right has been taken. In this case, the Commission claimed the Corps appropriated its "right to possess, use, regulate, and maintain" Black Lake.[3] The Commission argued that this takings claim accrued in 1997 when the Corps refused the drawdown. The trial court, however, thought the claim accrued in 1994 when the elevation in Pool 3 reached 95 MSL, because the Commission "knew or should have known that raising the pool level would result in uncontrolled aquatic plant growth."[4]

The appeals court found the lower court's analysis to be faulty. A takings claim accrues when the plaintiff knows or should know of the damage, *and* "all events which fix the government's alleged liability have occurred."[5] When the elevation of Pool 3 reached 95 MSL, the actual harm had not occurred; only the *potential* for harm had been established. The harm itself did not come into fruition until hydrilla had grown to harmful levels. The manifestation of the harm occurred gradually as a result of continuous natural processes.

In cases where the harm from a taking emerges gradually, courts may apply a principle originally enunciated by the U.S. Supreme Court: "when the government allows a taking of land to occur by a continuing process of physical events, plaintiffs may postpone filing suit until the nature and extent of the taking is clear."[6] The appeals court reasoned that the extent of the taking in this case would not be clear until "the hydrilla had grown, *and* had grown to harmful levels, *and* the Corps refused to drain the lake to alleviate the harm caused by the *overgrowth* of hydrilla."[7] The true accrual date, according to the appeals court, was no earlier than January 1997, which was within the limitations period.

Photograph of water hyacinth bloom courtesy of NASA's Invasive Species Forecast System.

Photograph of water hyacinth choking waterway, courtesy of USGS.

Dissent

Judge Alan D. Lourie dissented from the majority opinion on the ground that the limitation period starts at the time of the government action, not at the time the damages from that action are realized. He believed that the lower court had correctly determined this time to have been December 1994, when Pool 3 was filled. In Judge Lourie's view, the *Dickinson* doctrine applies only to a nar-

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Environmental Group Loses New Orleans Landfill Challenge

***La. Envtl. Action Network v. U.S. Army Corps of Engineers*, 2006 U.S. Dist. LEXIS 24344 (E.D. La. April 27, 2006)**

Josh Clemons

The after-effects of Hurricane Katrina continue to be felt along the northern Gulf coast, and are beginning to reverberate in the region's courtrooms. In April the U.S. District Court for the Eastern District of Louisiana rejected a challenge from environmental and citizen groups to an emergency permit issued by the U.S. Army Corps of Engineers for a landfill in New Orleans.

Background

Hurricane Katrina left an enormous volume of debris in its wake. The ongoing cleanup process has been a monumental task on a greater scale than any cleanup that has ever faced the region. The events that gave rise to this case occurred in this atmosphere of continuing emergency.

In February 2006, over five months after the disaster, waste disposal titan Waste Management submitted to the Louisiana Department of Environmental Quality (LDEQ) an "Emergency Disaster Cleanup Site Request" so that it could dispose of hurricane construction, demolition and vegetative debris at 16600 Chef Menteur Highway in New Orleans.

The Chef Menteur site is adjacent to the Bayou Sauvage National Wildlife Refuge and consists mostly of navigable waters. Waste Management therefore applied to the U.S. Army Corps of Engineers (Corps) for a Clean Water Act (CWA) § 404 "dredge and fill" permit so that it could construct the Chef Menteur landfill.[1] Sec. 401 of the CWA requires the permittee to obtain certification from the affected state that, among other things, the state's water quality standards will not be violated by the project.[2] LDEQ waived the certification requirement, citing the pressing need to dispose of storm debris.

On April 14 the Corps granted Waste Management an emergency authorization to begin operating the landfill while the formal permitting process continued. Within a week trucks were hauling waste to the site. Almost immediately, two groups – the Louisiana Environmental Action Network and Citizens for a Strong New Orleans East – sued to obtain a temporary restraining order and preliminary injunction to stop the use of the Chef Menteur site. The plaintiffs alleged that the Corps violated the CWA and the National Environmental Policy Act (NEPA) by issuing the emergency permit without providing the public with notice and an opportunity to comment, and without analyzing the need for an emergency permit.

Analysis

The injunctive relief the plaintiffs requested is a strong remedy, and courts require substantial convincing before they will comply with such a request. Plaintiffs are obligated to show: "(1) a substantial likelihood of success on the merits; (2) a substantial threat that [they] will suffer irreparable injury if the injunctive relief is denied; (3) the threatened injury to [them] outweighs the harm the injunction will cause the opponent; and (4) the injunctive relief will not disserve the public interest."[3] To determine whether the plaintiffs here had shown a "substantial likelihood of success on the merits" the court examined the NEPA and CWA claims in turn.

NEPA was enacted to help ensure that federal agencies consider the potential environmental impacts of their actions before acting. An agency that is considering an action that may adversely affect the environment must not only analyze the possible effects but also give notice to the public about the proposed action and allow the public to comment. However, a Corps regulation allows for emergency procedures to be followed in cases of "imminent risk of life, health, property or severe economic losses."[4] The emergency regulation allows for the usual NEPA documentation, and notice and comment procedures, to be postponed until after the action is taken.

The CWA protects the navigable waters of the U.S. from discharges of pollutants. Because discharges are sometimes unavoidable incidents of desirable projects, they may be permitted in some cases. CWA § 404 authorizes the Corps to issue permits for the discharge of dredge and fill materials, provided the agency obtains

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a § 401 certification from the state and provides the public with notice and an opportunity to comment on the permit. The Corps' emergency regulations allow it to circumvent these procedures in "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures."[5] However, even in emergency situations reasonable efforts must be made to receive public comments.

The plaintiffs sued the Corps under the Administrative Procedure Act, which allows a court to overturn an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[6] Courts are typically quite deferential to agency decisions, and are hesitant to substitute their own judgments for those of an agency.

Following this deferential approach the court determined that the plaintiffs were not likely to succeed on the merits of their claims that the Corps acted arbitrarily and capriciously under NEPA and the CWA in issuing the emergency permit. The NEPA claim failed because the Corps was acting pursuant to its General Permit for Emergency Authorizations within the New Orleans District. The General Permit, which had itself been through the NEPA process before it was issued in 1982, allows the Corps to grant temporary approval to begin important work immediately in emergency situations. The permit applicant must subsequently complete the usual permitting process, which Waste Management had already begun. If the permit is denied Waste Management must restore the site to its pre-project condition. These facts, combined with the court's acceptance of LDEQ's finding that New Orleans remained in a state of emergency, doomed the plaintiffs' NEPA claim.

The plaintiffs also asserted that the Corps violated its CWA regulations by failing to find that the situation qualified as an emergency by the agency's own standards. The court flatly rejected this claim, observing that the Corps had, in fact, made such a finding and had adequately articulated its reasons for it, which included adverse health effects of the debris and the difficulties involved in sending the debris to other landfills.

It was enough to torpedo the plaintiffs' case that they were unable to show a likelihood of success on the merits. Nonetheless, the court also addressed the plaintiffs' inability to show irreparable harm. The plaintiffs alleged that they would be harmed when pollutants leak from the landfill, but the court observed that this harm was speculative because Waste Management would be taking measures to avoid the release of pollutants. In addition, the ongoing permitting process would ensure that environmental analysis would eventually be undertaken and the plaintiffs would have a chance to comment.

Even in emergency situations reasonable efforts must be made to receive public comments.

The court put the final nail in the coffin by opining that the plaintiffs had also failed to show that injunctive relief would not disserve the public interest. The plaintiffs had argued that the Corps' action was contrary to the public interest because it could compromise both water quality and the public's interest in ensuring that federal agencies make informed permitting decisions. These arguments received little sympathy from the court because the NEPA process was merely postponed, and the public would still be able to have its say. If the permit were to be revoked Waste Management would have to clean up the site.

Conclusion

The district court denied the environmental and citizen groups' request to enjoin the construction of the Chef Menteur landfill in New Orleans. The landfill project will proceed.

Endnotes

1. The Clean Water Act prohibits discharge of dredge or fill materials into navigable waters without a permit. Sec. 404 authorizes the Corps to issue permits for such discharges. 33 U.S.C. § 1344.
2. 33 U.S.C. § 1341.
3. *La. Envtl. Action Network v. U.S. Army Corps of Engineers*, 2006 U.S. Dist. LEXIS 24344 at *5 (E.D. La. April 27, 2006).
4. 33 C.F.R. § 230.8.
5. 33 C.F.R. § 325.2(e)(4).
6. 5 U.S.C. § 706.

Texaco Wins One Battle in Platform Accident Case

District Court Must Reconsider Company's Claims

***Texaco Exploration and Prod., Inc. v. AmClyde Engineered Products, Inc.*, 448 F.3d 760 (5th Cir. 2006)**

Josh Clemons

An expensive accident that occurred during the construction of an offshore oil and gas production facility in the Gulf of Mexico led to a lawsuit that ensnared oil companies, equipment manufacturers, insurers and others. In May the U.S. Court of Appeals for the Fifth Circuit untangled the many legal issues.

Background

Texaco Exploration and Production, along with co-plaintiff Marathon Oil, hold a federal oil and gas lease on the Viosca Knoll on the Outer Continental Shelf in the northern Gulf of Mexico. On this site Texaco has undertaken its $400 million Petronius project, with the goal of producing up to 100 million barrels of oil equivalent. The project's main structure is the compliant tower, an 1870-foot behemoth that is permanently attached to the ocean floor but flexes to withstand the forces of the ocean.

Photograph of oil rig courtesy of NOAA.

Design, construction, and installation of the compliant tower was contracted to J. Ray McDermott, Inc. (McDermott). During construction McDermott would utilize a barge, the DB-50, owned by J. Ray McDermott International Vessels, Ltd. (JRMIV). Mounted on this barge was a massive crane built by the predecessor to AmClyde Engineered Products, Inc.

On December 3, 1998, during construction of the compliant tower, disaster struck. The main load line of the crane failed, causing an enormous piece of the structure – the South Deck Module – that was being lifted into place to plunge into the Gulf. The loss of the South Deck Module delayed the project for fifteen months. In addition to suffering the costs of losing the Module, the oil company also suffered a loss due to the delay in commencing oil and gas production.

Texaco had insured the Petronius project with Builder's Risk Underwriters (Underwriters), who paid out $72 million for the loss of the Module and other covered losses. However, this amount did not include the costs to Texaco from the delay in production.

The Lawsuit

With this quantity of money at stake a lawsuit is virtually inevitable. Texaco sued AmClyde under theories of negligence and product liability. Texaco premised jurisdiction on either a federal question under the Outer Continental Shelf Lands Act (OCSLA), or alternatively, admiralty. Texaco would likely have sued McDermott, but their contract contained a binding arbitration clause.[1]

Texaco sought a jury trial, but the district court refused on the grounds that admiralty law extinguishes the right to a jury trial. Jurisdiction depended on admiralty because the court determined that the OCSLA did not apply in this case. AmClyde moved for judgment as a matter of law and the court granted it. Texaco appealed the district court's ruling to the Fifth Circuit.

The Appeal

Texaco appealed the district court's decision to base jurisdiction on admiralty rather than OCSLA, and thus

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to strike the company's request for a jury trial. Texaco's stance on appeal was that there was overlapping jurisdiction under both OCSLA and admiralty.

The court first addressed Texaco's assertion that OCSLA jurisdiction was proper. OCSLA provides that federal courts "shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, [or] of the subsoil and seabed of the outer Continental Shelf."[2] The Act explicitly defines "development" as including platform construction. The court noted that it has always construed OCSLA's grant of jurisdiction broadly.

AmClyde argued that admiralty jurisdiction was proper because the damages occurred during the "traditional maritime conduct of transporting goods across navigable waters."[3] The district court had agreed with this argument and determined that admiralty jurisdiction foreclosed OCSLA jurisdiction. The appeals court was faced with a choice: did the accident occur during the development of Outer Continental Shelf minerals, as Texaco asserted, or during the transportation of goods, as AmClyde believed?

The court endorsed Texaco's position, stating "at the time of the loss of the South Deck Module, the parties were undeniably involved in the development of the Outer Continental Shelf" and that the harm Texaco suffered would not have occurred but for that fact.[4] The court rejected AmClyde's argument because "the undisputed facts demonstrate[d] that traditional maritime transportation was complete at the time of the loss."[5] The court reached this conclusion because the DB-50 had arrived at its final position for the installation of the module, which was being lifted into place by the crane (as opposed to being transported) when it was lost.

The district court had therefore erred in denying Texaco a jury trial under maritime law.

Having found that jurisdiction under OCSLA was proper, the appeals court proceeded to analyze whether the district court erred in finding that admiralty jurisdiction existed for Texaco's claims. Admiralty jurisdiction over an incident depends on two elements: location, and connection with maritime activity. The location requirement was unquestionably satisfied because the incident took place on navigable waters. To satisfy the connectivity requirement, the incident in question must have "the potential to disrupt maritime commerce," and the "general character of the activity giving rise to the incident [must show] a substantial relationship to traditional maritime activity."[6]

To make the connectivity determination the court considered Texaco's various tort claims. Texaco accused the defendants of: "(1) defective and unreasonably dangerous products design…; (2) negligent failure to furnish sufficient information regarding operating limitations to the barge's owner; (3) negligent failure to maintain, inspect and/or remedy the crane's defects; (4) negligent failure to alert Texaco to a known danger with respect to the crane; (5) negligent failure to prevent the construction project from proceeding with knowledge of the crane's defects; (6) defective and unreasonably dangerous condition of the wire rope…; (7) negligent provision of unmatching port and starboard load lines; and (8) negligent failure to detect deficiencies of the crane and wire rope during a test lift and inspection or a failure to warn if the deficiencies were detected."[7] The court found these causes of action to be inadequate to support admiralty jurisdiction because any tenuous connection they had to traditional maritime activity was overshadowed by their connection to development of the Outer Continental Shelf. Therefore, jurisdiction was properly under OCSLA, not admiralty.

The court then faced the task of determining whether the district court's denial of a jury trial was reversible error, which required an examination of the applicable substantive law. Both Texaco and AmClyde believed that maritime law would be the applicable substantive law because they had agreed to that condition in their contract. However, the appeals court observed that the OCSLA precludes the application of maritime law, instead utilizing federal law with the law of the adjacent state serving to fill any gaps that might remain. The district court had therefore erred in denying Texaco a jury trial under maritime law. AmClyde argued that this error was a harmless one because the lower court had granted AmClyde's motion for judg-

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Florida Court Rules Restoration Project a Taking

Beach Project Infringed on Riparian Rights

***Save our Beaches, Inc. v. Fla. Dept. of Envtl. Protection*, 2006 WL 1112700 (Fla. App. April 28, 2006)**

Josh Clemons

Beachfront landowners in Florida challenged a state administrative agency's decision to grant a permit for a beach restoration project on the grounds that it effected an unconstitutional taking of their property without compensation. The District Court of Appeal of Florida, First District, ruled in favor of the property owners and reversed the agency's decision.

Background

Hurricane Opal lashed the northern Gulf Coast in 1995, leaving extensive erosion in its wake. In 2003, after careful study, the City of Destin and Walton County applied to the Florida Department of Environmental Protection (DEP) for a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands so that they could begin a project to restore their fabled white sand beaches. The permit would allow Destin and Walton County to dredge and transport sand from a borrow area in neighboring Okaloosa County to rebuild the eroded shorelines.

In 2004 DEP issued a Notice of Intent to issue the permit. Two groups of property owners, Save Our Beaches (SOB) and Stop the Beach Renourishment (STBR), filed a petition for an administrative hearing to challenge the permit. They also filed a petition with Florida's Internal Improvement Fund, which manages public trust lands, to challenge the establishment of the county erosion control line.

SOB was a group of approximately 150 people who owned beachfront properties in Destin. STBR was made up of six people who owned beachfront property in the area of the proposed project.

When the complaints went before the administrative law judge (ALJ)[1] the issues were whether the city and county had reasonably assured that applicable water quality standards would be preserved, and whether the city and county had acquired the private property rights necessary to go forward with the project. The ALJ determined that water quality was reasonably assured, and recommended that the permit be issued. Accordingly, DEP issued the permit.

The joint permit was comprised of two individual permits and an authorization, all of which are governed by different Florida statutes and regulations. The individual permits were a coastal construction permit and a wetland/environmental resource permit. The authoriza-

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Photograph of Destin Beach, FL courtesy of USGS, Coastal & Marine Geology Program.

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tion would allow the city and county to use the state's sovereign submerged lands.

The Florida Administrative Code (FAC) allows for these joint permits to issue when various conditions are met. FAC Rule 18-21.004(3)(b) states: "[s]atisfactory evidence of sufficient upland interest is required for activities on sovereignty submerged lands riparian to uplands" except in cases where "a governmental entity conducts restoration and enhancement activities, provided that such activities do not unreasonably infringe on riparian rights." Riparian rights are the property rights that accompany ownership of land that borders water. SOB and STBR asserted that the project unreasonably infringed on their members' riparian rights, and the city and county had not shown sufficient upland interest. The specific riparian right at issue was the right to accretion; that is, the right to the extension of one's riparian lands by the natural addition of sand.

The DEP had determined that the project did not unreasonably infringe on the landowners' common-law right to accretion because a Florida statute mandates the establishment of an erosion control line before a restoration project may commence.[2] The erosion control line fixes the boundary between private riparian land and state sovereignty land. However, another section of the statute divests the riparian owner of the common-law riparian right to accretions after the erosion control line has been fixed. The DEP recognized this fact, but nonetheless concluded that there was no unreasonable infringement of riparian rights because the infringement was authorized by statute. The ALJ affirmed the DEP's conclusion, with the caveat that there was no unreasonable infringement of riparian rights *assuming* the statute was constitutional. The ALJ could not rule on the constitutionality of the statute because an administrative body does not have the authority to do so. The permit was issued.

The Court's Analysis

The court first faced the threshold issue of SOB's and STBR's standing to bring suit, which was challenged by DEP. When organizations challenge an agency decision in court they must be able to prove "associational" or "organizational" standing; that is, they must show that their individual members are or will be adversely affected by the decision. The court found that SOB lacked standing because its members did not own property in the area that would be affected by the project. All of STBR's members, on the other hand, owned property that would be directly affected by the project. STBR was therefore allowed to proceed with its constitutional claim.

STBR challenged the DEP's issuance of the permit as an unconstitutional taking of private riparian property rights without just compensation. Riparian rights include the right to receive accretions to that land (as well as the corresponding risk of losing property by natural erosion). In Florida, the boundary between private riparian property and the state's sovereign land is usually the ordinary high water mark, which migrates over time as sand is added or removed by natural forces. As the boundary moves, the landowner's property at all times retains contact with the water.

However, as described above, a Florida statute requires that the boundary line be fixed before a restoration project takes place. Any accretion that occurs after the line is fixed will eliminate the riparian owner's contact with the water. In addition, the landowner is deprived of the right to accreted land. These were the specific property interests that STBR argued were unconstitutionally taken.

The court agreed with the landowners. DEP's final order approving the permit worked to deprive STBR's members of their riparian rights. Under Florida law, the government is prohibited from taking riparian rights without the landowner's agreement, even when the power of eminent domain is exercised. Because this taking was clearly an unreasonable infringement on riparian rights, the city and county would have to provide satisfactory evidence of sufficient upland interest in accordance with FAC Rule 18-21.004(3)(b).

Conclusion

The court reversed DEP's final order approving the permit and returned the issue to the agency to prove sufficient upland interest. The court also declared invalid the state's determination of the erosion control line, to the extent that it differed from the deeds of STBR's members.

Endnotes

1. An ALJ has duties and powers similar to those of a judge in a civil or criminal court, but he or she is a member of the executive branch of government instead of the judicial branch and presides only over the proceedings of administrative agencies.
2. Fla. Stat. § 161.141.

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information to evaluate impacts, and that the projects were likely to come to fruition because the applicants had expended considerable money on the applications, the applicants are financially stable, and the demand for natural gas is great.

The court acknowledged that the plaintiffs raised valid arguments, but deferred to the Secretary's judgment. The court opined that it was not unreasonable for the Secretary to conclude that the proposed projects were not sufficiently certain to be built because the applications could still be withdrawn, the Secretary could still require closed loop systems, technology is advancing, and Gov. Blanco of Louisiana could still veto approved projects (she did, in fact, veto one of the three projects that was excluded from the cumulative impacts analysis). The court did not explicitly justify the distinction between applications that had and had not entered the NEPA process, in keeping with its adherence to the doctrine of strong deference to agency decisions.

The second question before the court concerned the open loop system. The Deepwater Port Act makes granting of a license conditional on the facility being "constructed and operated using *best available technology*, so as to prevent or minimize adverse impact on the marine environment."[8] The plaintiffs argued that the Secretary's decision to allow the open loop system was contrary to law because NMFS and other agencies, and the Secretary himself, had agreed in the final EIS that a closed loop system – which is unquestionably available – would be environmentally preferable.

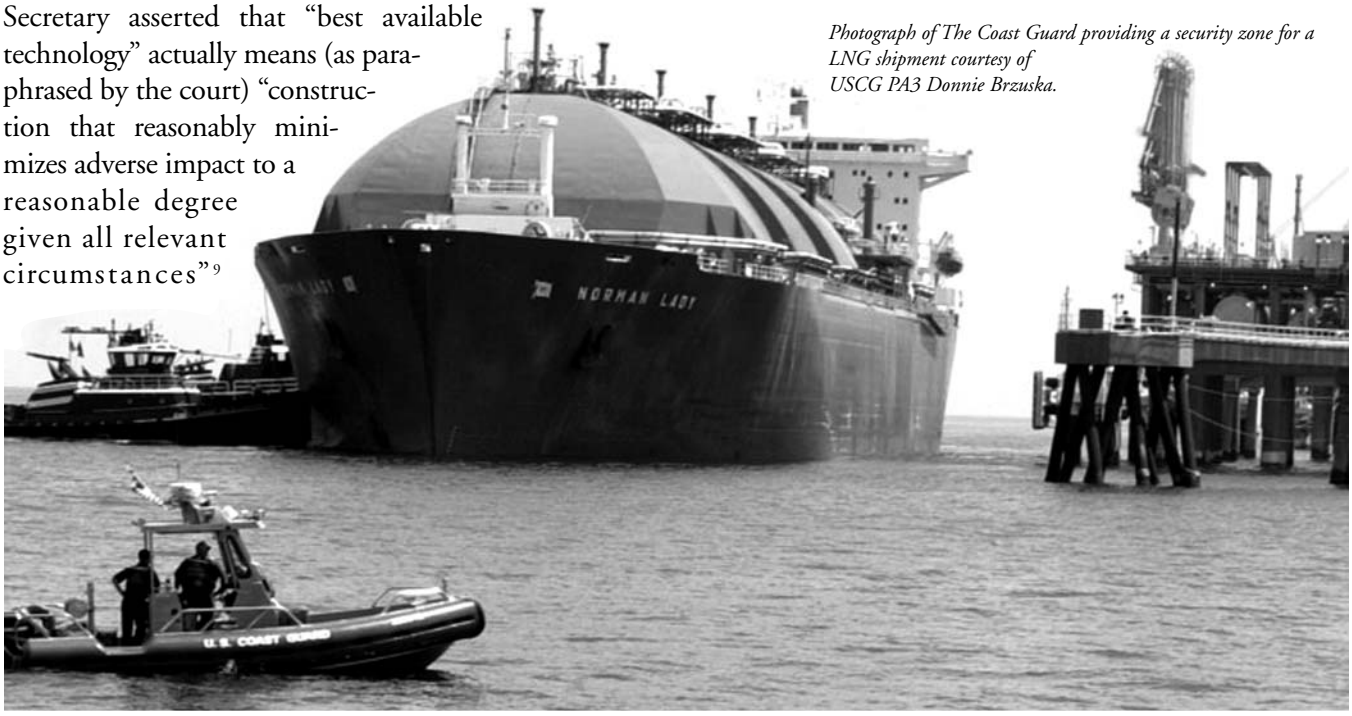
In response to this argument the Secretary asserted that "best available technology" actually means (as paraphrased by the court) "construction that reasonably minimizes adverse impact to a reasonable degree given all relevant circumstances"[9] and that other non-environmental criteria, including cost, could outweigh Congress' clear intention that the *best* available technology be used. The Secretary also claimed that requiring the best available technology could mean that no port could ever be built, because the best available technology might be cost-prohibitive (although closed loop systems are not generally considered cost-prohibitive). The court accepted the Secretary's logic and denied the plaintiffs' petition for review.

Conclusion

Deferring to the judgment of the Secretary of Transportation, the federal appeals court denied the environmental and fishing groups' petition for review of the Secretary's approval of Gulf Landing's license to construct a liquefied natural gas facility off the Louisiana coast.

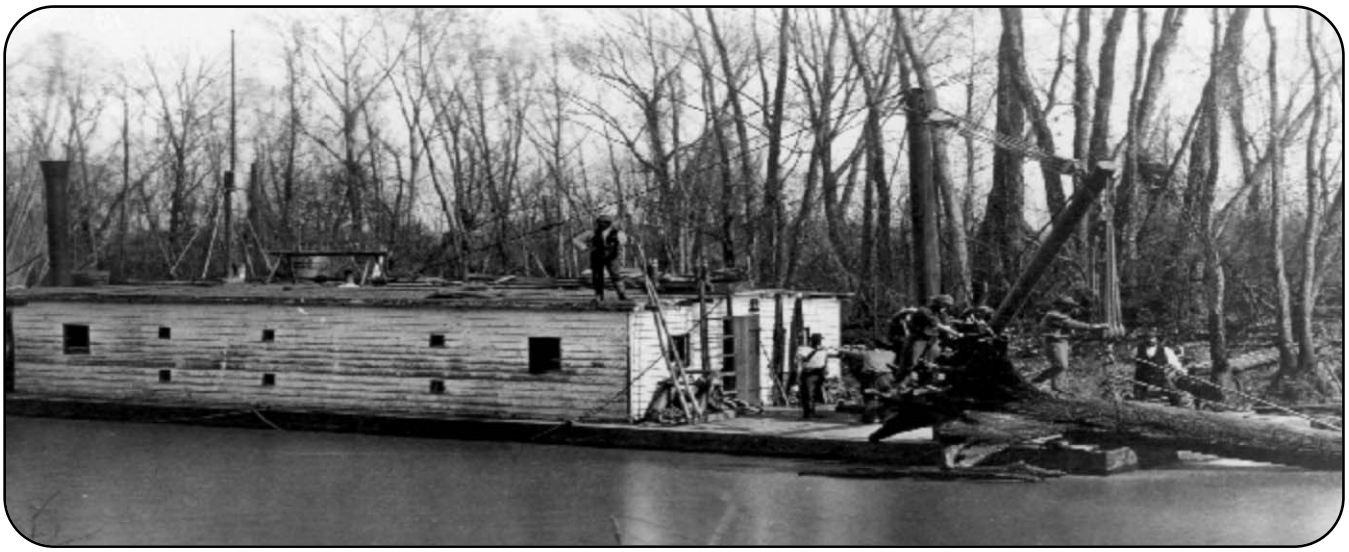
Endnotes

1. *Gulf Restoration Network v. U.S. Dept. of Transp.*, 2006 WL 1549953 at *1 (5th Cir. June 8, 2006).
2. *Id.*
3. 42 U.S.C. §§ 4321-4370(f).
4. *Gulf Restoration Network* at *2.
5. 5 U.S.C. § 706(2)(A).
6. *Gulf Restoration Network* at *3 (citing *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000)).
7. *Id.* at *4.
8. 33 U.S.C. § 1503(c) (emphasis added).
9. *Gulf Restoration Network* at *7.



Photograph of The Coast Guard providing a security zone for a LNG shipment courtesy of USCG PA3 Donnie Brzuska.

Takings Claim, from page 4



Historic photograph of the Red River raft being cleared courtesy of U.S. Army Corps of Engineers (circa 1873).

row class of cases involving takings effected by continuing flooding, and not in this case wherein "gradual harm [was] caused by a singular discrete act: the taking of the right to drain water from Black/Clear Lake into Red River."[8] Judge Lourie would have upheld the lower court's decision.

Conclusion

Judge Lourie's reasoning notwithstanding, the Federal Circuit Court of Appeals reversed the Court of Federal Claims' dismissal of the Commission's case on statute of limitations grounds. The case will return to the lower court for further proceedings.

Endnotes

1. 28 U.S.C. § 2675.
2. 28 U.S.C. § 2401(b).
3. *Northwest La. Fish & Game Preserve Commn. v. U.S.*, 446 F.3d 1285, 1290 (Fed. Cir. 2006).
4. *Id.* (internal quotes omitted).
5. *Id.*
6. *Fallini v. U.S.*, 56 F3d 1378 (Fed. Cir. 1995); *see U.S. v. Dickinson*, 331 U.S. 745 (1947).
7. *Northwest La. Fish & Game Preserve Commn.* at 1291.
8. *Id.* at 1293 (Lourie, J., dissenting).

Texaco, from page 8

ment as a matter of law, which would have prevented the case from going before a jury anyway. Texaco countered that there remained "substantial evidence on disputed facts" such that a reasonable jury could find in its favor, and the court agreed.[8] The district court's erroneous denial of Texaco's request for a jury trial was not harmless.

Conclusion

The Fifth Circuit refused to affirm the district court's ruling in AmClyde's favor and remanded the case. On remand, the district court must determine which state's substantive law applies to Texaco's claims, and must also reconsider the request for a jury trial.

Endnotes

1. The insurance company involved in these events filed a separate suit that was consolidated with this case. The legal aspects of the insurance company's case are not discussed in this article.
2. 43 U.S.C. § 1349(b)(1)(A).
3. *Texaco Exploration and Prod., Inc. v. AmClyde Engineered Products, Inc.*, 448 F.3d 760, 769 (5th Cir. 2006).
4. *Id.*
5. *Id.*
6. *Id.* at 770.
7. *Id.*
8. *Id.* at 776.

Mississippi Judge Rules on Katrina Claim

Decision Paves Way for Future Cases

***Leonard v. Nationwide Mutual Ins. Co.*, 2006 WL 2353961 (S.D. Miss. Aug. 15, 2006)**

Josh Clemons

In August a federal district court judge rendered a verdict in the first trial to reach a conclusion over disputed Hurricane Katrina insurance payments. Judge L.T. Senter of the U.S. District Court for the Southern District of Mississippi in Gulfport held that Paul and Julie Leonard were not entitled to payment for damages to their home caused by incursion of water. However, the judge invalidated an exclusion for wind damage that occurs in conjunction with water damage, so the Leonards were able to recover for losses due to wind.

Factual Background

Hurricane Katrina made landfall on Mississippi's Gulf coast on August 29, 2005. Among the thousands of homes in the storm's path was the Pascagoula residence of police officer Paul Leonard and his wife Julie. On that dark morning winds over one hundred miles per hour ripped through their neighborhood, and water from the Mississippi Sound surged five feet above the Leonard's foundation. The water destroyed or seriously damaged the flooring, walls, and personal belongings on the first floor of the Leonards' home but did not reach the second floor. Fortunately, the roof remained watertight despite losing some shingles to the violent winds. The wind also caused a golf ball-sized hole in a first-floor window.

A combination of wind and water plastered the exterior of the Leonards' home with debris. The family's attached garage suffered both wind and water damage as well, and a tree, toppled by the wind, smashed a fence.

The Leonards hired an expert who estimated their total storm-related damages at $130,253.49. Of this amount, $47,365.41 was attributed to wind damage and included replacement of the roof.

The Leonards had a homeowner's insurance policy from Nationwide Mutual Insurance Company, which they had purchased from local Nationwide agent Jay Fletcher. Their policy covered their house, attached structures, and the property inside the house. However, the policy contained two exclusions that created the controversy addressed in this lawsuit. The first excluded losses from, among other things, "flood, surface water, waves, tidal waves, overflow of a body of water, [and] spray from these, whether or not driven by wind."[1] The second excluded losses from, among other things, "[w]eather conditions, if contributing in any way with an exclusion listed in paragraph 1."[2] Paragraph 1 included the exclusion for "flood, surface water, waves," etc.

Nationwide sent an adjustor to the Leonards' home. He authorized payment only for damage caused solely by wind, which he determined to be the loss of roof shingles and the destruction of the fence. After their five hundred dollar deductible was applied, the Leonards received $1,661.17, which was $128,592.32 less than their estimated damages.

The Leonards did not have a flood insurance policy. They had discussed the need for one in 1999 with Fletcher, who regularly advised his clients that they did not need flood insurance if they did not live in a flood prone area. Because the Leonards did not live in a flood prone area, Fletcher told them they did not need flood insurance. Fletcher did not even have flood insurance on his own house, although he had sold numerous flood policies in Pascagoula, including twelve in the Leonards' neighborhood. Fletcher did not give the Leonards a specific reason why he was not recommending flood insurance.

Although Fletcher never actually said so, Mr. Leonard inferred from his discussions with the agent that his homeowner's policy would cover all damages from a hurricane, including water damage. Mr. Leonard testified at trial that he read the policy and that he did not ask Fletcher about the exclusions at issue.

The Leonards sued Nationwide on the grounds that Fletcher misled them, and that the policy was ambiguous and should therefore be construed in their favor.

The Court's Decision

The court rejected the Leonards' claim that they suffered harm by relying on Fletcher's alleged misrepresentation. Such a claim requires the reliance to be reasonable. The court determined that the Leonards' reliance

See Katrina, page 14

Katrina, from page 13

was not reasonable because Mr. Leonard had read the insurance policy and was also aware that optional flood policies were available; therefore, he had reason to be aware that the type of damage his home suffered might not be covered, and it was his responsibility to make further inquiries to find out the extent of his coverage.

The bulk of the court's opinion concerned the enforceability of the two exclusions described above. The court upheld the exclusion for water damage after finding that it was not ambiguous and that similar exclusions had been upheld in earlier cases involving hurricane losses.

The second exclusion presented more of a problem. This exclusion, by the court's literal reading, would have excluded *any* wind damage that occurred in circumstances in which water damage also occurred. The court observed that "an insured whose dwelling lost its roof in high winds and at the same time suffered an incursion of even an inch of water could recover nothing under his Nationwide policy."[3] This situation troubled the court, because taken as a whole the policy insured losses from wind damage. The court concluded that the second exclusion was ambiguous. Nationwide argued that the policy was unambiguous because it had been approved by the Mississippi Department of Insurance, but the court disagreed. Even the Department of Insurance makes mistakes occasionally, the court remarked, and that is why its decisions are subject to judicial review.

Under Mississippi law, the Leonards are entitled to recover the loss that they can prove was caused by the covered cause (wind), and Nationwide is not responsible for losses that it can prove were caused by the excluded cause (water). In this case, the court found that Nationwide could prove almost all of the damage to the Leonards' home was caused by water. The Leonards proved that they suffered wind damage losses $1,228.16 in excess of what Nationwide had originally paid, and were awarded that amount in addition to their original $1,661.17 compensation. This amount was far short of the Leonards' total estimated losses.

Conclusion

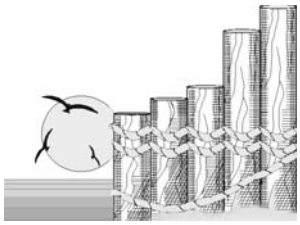
This decision could hardly be considered a victory for the Leonards; however, in the long run it could turn out to be tremendously costly for insurers – to the tune of hundreds of millions of dollars. Some insurers who have issued similar policies have been attempting to deny claims for wind damage when it occurred in combination with water damage. Judge Senter's decision will allow people insured under such policies the opportunity to present evidence in court that their damage was caused by wind, and accordingly the opportunity to receive some compensation for their losses. The Leonards' attorney, Richard "Dickie" Scruggs, has said that this decision will "open the door for recovery for thousands of Mississippi homeowners."[4]

Endnotes

1. *Leonard v. Nationwide Mutual Ins. Co.*, 2006 WL 2353961 at *2 (S.D. Miss. Aug. 15, 2006).
2. *Id.*
3. *Id.* at *7.
4. Joseph B. Treaster, *Judge Rules for Insurers in Katrina*, N.Y. Times C1 (Aug. 16, 2006).

Photograph credits, left to right: Damage to housing courtesy of the U.S. EPA; Katrina aerial with state outline overlay courtesy of NOAA; and, grounded boat next to damaged house, courtesy of the USDA.

Interesting Items



Around the Gulf…

The Mississippi Department of Natural Resources (DMR) was honored with an **Award of Excellence** from the National Association of Government Communicators at their annual meeting in July. DMR received the communicators' group's Blue Pencil Award for excellence in written, filmed, audio/videotaped, published and photographed government information products for its 2005 Marine Information Calendar featuring the theme "Preserving and Enjoying Mississippi's Coastal Resources." The calendar featured student art as well as information useful to fishermen such as tide data, sunrise/sunset times, moon phases, and saltwater fish size and possession limits.

Naval Station Pascagoula will be closing its doors by November 15, in accordance with a recommendation by the Base Realignment and Closure Commission. The 437-acre station currently houses around nine hundred sailors. It is located on Singing River Island, which was built from dredged material in 1985. The property will be returned to the State of Mississippi. A variety of options are being considered for redevelopment of the site, including use by Northrop Grumman Ship Systems or expansion of existing Coast Guard operations.

The federal government has announced that it will cover **one hundred percent of removal costs** for Hurricane Katrina debris removed from the Mississippi Sound and other waterways in south Mississippi through May 15, 2007. Land debris removal will be reimbursed at a rate of ninety percent, with local governments and the state footing the bill for the remaining ten percent.

ConocoPhillips has withdrawn its bid to build a **liquefied natural gas (LNG) terminal** in the Gulf off the coast of Alabama, south of Dauphin Island. The Compass Port facility would have used the controversial "open loop" method of regasification, which can harm marine life. Alabama governor Bob Riley had indicated that he would veto ConocoPhillip's application if the company insisted on using an open loop system instead of the more environmentally protective closed loop technology. ConocoPhillips has kept open the possibility that it will go back to the drawing board and return with an improved proposal in the future.

An economic analysis performed by the U.S. Fish & Wildlife Service has concluded that the cost of designating **critical habitat for the endangered Alabama beach mouse** would be between $18 million and $51 million. In its press release announcing the analysis the Service appears to embrace the highly questionable view that critical habitat designations provide little additional protection for endangered species.

Around the country…

A group of ten climate experts has publicly spoken out against **runaway development in coastal areas** that are at risk of hurricanes. The group, led by Massachusetts Institute of Technology climatologist Kerry Emanuel, decries government policies like federal flood insurance that subsidize "our lemming-like march to the sea" and recommends that government and industry "undertake a comprehensive evaluation of building practices, and insurance, land use, and disaster relief policies that currently serve to promote an ever-increasing vulnerability to hurricanes." The scientists' statement may be viewed at http://wind.mit.edu/~emanuel/Hurricane_threat.htm.

The Nature Conservancy, long renowned for its efforts in the purchase and preservation of environmentally valuable land, has expanded its efforts to **purchasing fishing permits** in California. As of mid-July the Conservancy had bought six federal trawling permits and four trawling vessels, with the goal of limiting what the group considers to be ecologically destructive fishing practices. Bottom trawling, in which large, weighted nets are dragged across the ocean floor, can damage marine habitat and also result in significant bycatch. Fishers have been generally receptive to the Conservancy's approach because it offers significant financial incentive, as opposed to increased regulation.

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

MASGP-06-009-02

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August, 2006

... Upcoming Conferences ...

•SEPTEMBER 2006 •

Livable Communities: Walking, Working, Water-Connecting Urban and Environmental Issues with Design Opportunities
http://www.aia.org/ev_rudc_seattle2006
September 14-17, 2006, Seattle, WA

Oceans 2006 Conference
http://www.oceans06mtsieeeboston.org/
September 18-21, Boston, MA

7th Coastal and Estuarine Shallow Water Science & Management Conf.
http://www.wetlandsworkgroup.org/shallowwater.htm
September 25-27, 2006, Atlantic City, NJ

•OCTOBER 2006 •

16th Annual Clean Gulf
http://www.cleangulf.org
October 17-19, 2006, New Orleans, LA

Opportunities in Aquaculture
http://www.aquaculture-online.org
October 19-20, 2006, Fort Pierce, FL

6th Marine Law Symposium
http://feflow2006.feflow.de/
October 19-20, 2006, Bristol, RI

Hazardous Substances, Site Remediation, and Enforcement
http://www.ali-aba.org
October 26-27, 2006, Washington, DC

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