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WATER LOG

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Fifth Circuit Rejects Crawfish Producer's NEPA Challenge

***Louisiana Crawfish Producers Assn. v. Rowan*, 2006 WL 2474845 (5th Cir. Aug. 29, 2006)**

Rick Silver, 3L, University of Mississippi School of Law

On August 29, 2006 the U.S. Court of Appeals for the Fifth Circuit rejected an appeal brought by the Louisiana Crawfish Producers Association (LCPA), which challenged both the environmental assessment performed by the Army Corps of Engineers and the Corps' conclusion that the proposed project in Buffalo Cove would have no significant environmental impact. The court affirmed the Corps' decisions.

Background

In 1982 the Corps issued a Final Environmental Impact Statement (FEIS) for the Atchafalaya Basin in Louisiana. The Basin is a flood control area that drains approximately 41 percent of the continental United States. The Corps' goal was to ensure passage of water through the Basin, while restoring and maintaining its historical conditions. The FEIS divided the Basin into

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Fifth Circuit Upholds Agency Decision in New Orleans Housing Project Case

***Coliseum Square Assn., Inc. v. Jackson*, 2006 WL 2664455 (5th Cir. Sept. 18, 2006)**

Joshua R. Holmes, 2L, Stetson University College of Law

A group of non-profit organizations representing citizens, residents, and merchants in New Orleans brought an action against the Department of Housing and Urban Development (HUD) seeking a declaratory judgment that HUD had failed to comply with the National Environmental Policy Act of 1969 (NEPA) and the National Historic Preservation Act (NHPA) in funding the St. Thomas Housing Development revital-

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thirteen Management Units. One of these Units was Buffalo Cove, the subject of this dispute. The Corps' plan for Buffalo Cove called for a series of pipelines and for the creation of spoilbanks which would capture and convey water and sediment. However, these spoilbanks also restricted public access.

In accordance with the National Environmental Policy Act (NEPA), from 1999-2003 the Corps performed an environmental assessment (EA) on the Buffalo Cove Management Unit. The EA stated that the goal of the project was "to improve interior circulation within the swamp; remove barriers to facilitate north to south flow; provide input of oxygenated, low temperature river water; and prevent or manage sediment input into the interior swamps."[1]

In July of 2003, the Corps opened the project to public review and comment. Of the 134 comments, only thirty-two opposed the Corps' assessment. On March 15, 2004, the Corps entered a Finding of No Significant Impact (FONSI) for the Buffalo Cove project. This finding allowed the Corps to proceed with the project.

The LCPA, a non-profit organization of commercial crawfishermen, proposed an alternative plan for Buffalo Cove during the public notice and comment period. The LCPA wanted the Corps to "open up the historical bayous and enforce the permit requirements for the pipelines."[2] The EA performed by the Corps did not address this alternative and the LCPA sought an injunction of the project, arguing that the FONSI was in error since the Corps disregarded its proposed alternative. The district court ruled in favor of the Corps and the LCPA appealed to the Fifth Circuit.

NEPA

NEPA requires all federal agencies to prepare Environmental Impact Statements (EISs) for "major federal actions significantly affecting the quality of the human environment."[3] An EIS is not required if the federal action is not major or does not have a significant impact on the environment. In order to determine if an EIS is necessary, an agency must perform an EA, which is a "low budget environmental impact statement designed to show whether a full-fledged EIS is necessary."[4] If an EIS is not found to be necessary, then a FONSI will be issued and the project may proceed.

Fifth Circuit's Analysis

The court began by acknowledging that an agency's NEPA decisions should be afforded a considerable degree of deference and that "courts are to uphold the agency's decision unless the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[5]

The first issue that the court addressed was whether or not the Corps was required to consider and reject the LCPA's proposed alternative in the EA. LCPA argued that any reasonable alternative must be included in the EA, and that since its proposed plan was reasonable, it should have been included in the Buffalo Cove EA. Alternatively, the Corps asserted that the proposal was impractical and would produce more sedimentation in Buffalo Cove, as opposed to the Corps' goal of reduced sedimentation.

While the court acknowledged that NEPA does mandate the discussion of alternatives in the EA, the court noted that the regulation does not require that all proposed alternatives be discussed in the EA; there must be some limit to the number of alternatives considered. The court held that since the Corps believed that the LCPA's project would result in counterproductive sedimentation, the Corps was not arbitrary and capricious in choosing to reject the LCPA's proposed alternative.

The second question the court faced was whether the Corps' FONSI was arbitrary and capricious, as the LCPA argued. The LCPA asserted that the Corps' FONSI was arbitrary and capricious for three reasons.

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Sea Grant

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http://www.olemiss.edu/orgs/SGLC

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ization project. It further sought an injunction preventing HUD from dispersing further funds until such time as it complied with those statutes. The U.S. Court of Appeals for the Fifth Circuit held that, because it did not appear that HUD acted "arbitrarily, capriciously, or contrary to law"[1] in its findings of the project's environmental impacts, HUD was in full compliance with the requirements of the statutes.

Overview of the Statutes

NEPA sets procedural requirements that agencies must follow to determine what environmental impacts their proposals will have. Under the procedural requirements established by NEPA, a proposal for a major federal action must include an Environmental Impact Statement (EIS).[2] NEPA gives the Council of Environmental Quality (CEQ) authority to issue regulations that interpret the statute.[3] According to CEQ regulations, an agency may prepare an Environmental Assessment (EA) and issue a "finding of no significant impact" (FONSI) if the action is excluded from the requirement to produce an EIS.[4]

NHPA imposes requirements that an agency undertaking a federally assisted project must follow prior to the approval of expenditure of funds.[5] The federal agency must take into account the effects that the project may have on historical sites.[6] The agency must also follow certain procedural requirements in the review process, such as consulting with the State Historic Preservation Officer (SHPO) and allowing the Advisory Council on Historic Preservation (ACHP) an opportunity to comment.[7]

Factual Background

In 1994, the Housing Authority of New Orleans (HANO) began an effort to renovate the St. Thomas Housing Development, a residential public housing complex in the Lower Garden District. In 1996, HUD granted HANO $25 million for St. Thomas' revitalization and became responsible for ensuring that the project satisfied the requirements of NEPA and NHPA.

The initial plan for the St. Thomas project only included housing units. HANO enlisted the help of Historic Restorations, Inc. (HRI) to improve the plan. An amended plan submitted to HUD in 2000 included new low-income housing, new market-rate housing, a senior care facility, and a retail shopping center.

In Fall of 2000, HUD completed the review required by NHPA which examined the environmental impact the project would have on the historical sites. HANO, the SHPO, and the ACHP signed a Memorandum of Agreement for the project and demolition began shortly after. In May 2001, the NEPA environmental assessment review was completed and HUD adopted the proposed EA/FONSI.

After HRI obtained a commitment from Wal-Mart to become the retailer, the SHPO asked to reopen the NHPA file to determine the effects Wal-Mart may have on historical properties in the area. As a result of the study, HUD determined the assessment of the project's potential effects should be expanded. In July 2002 the plaintiffs filed suit, claiming non-compliance with NEPA and NHPA. Consequently, HUD reopened the NEPA process and a new EA/FONSI was approved in February 2003.

Court's Decision

The plaintiffs first argued that noise levels and the number of housing units affected by the project automatically required HUD to produce an EIS. The court found that HUD's reliance on a 2002 noise survey, which measured noise within a specific area over a 24-hour period, was consistent with agency procedural requirements and a reasonable method by which to measure potential noise effects. The court then paid deference to HUD's interpretation of a CEQ regulation mandating preparation of an EIS if 2,500 dwellings are affected by a project. It found HUD's interpretation that the regulation created two categories of affected dwellings to be reasonable.

The remainder of the plaintiffs' arguments concerning HUD's environmental assessment focused on their contention that HUD's failure to prepare an EIS was contrary to law. In cases attacking an agency's decision not to prepare an EIS, the plaintiff must prove the allegations by a preponderance of the evidence; the plaintiff must show more than mere deficiencies.[8]

The court examined various areas of HUD's study, such as environmental justice, zoning, businesses occupying historic buildings, toxic and hazardous waste, lead contamination, and traffic. It found that in every instance the plaintiffs offered no evidence that HUD acted "arbitrarily, capriciously, or contrary to law."[9] The plaintiffs offered evidence of different methodology that might illustrate deficiencies in HUD's review; however, their proffered evidence failed to prove their allegations by a preponderance of the evidence. Thus, the court denied the plaintiffs' request for an injunction.

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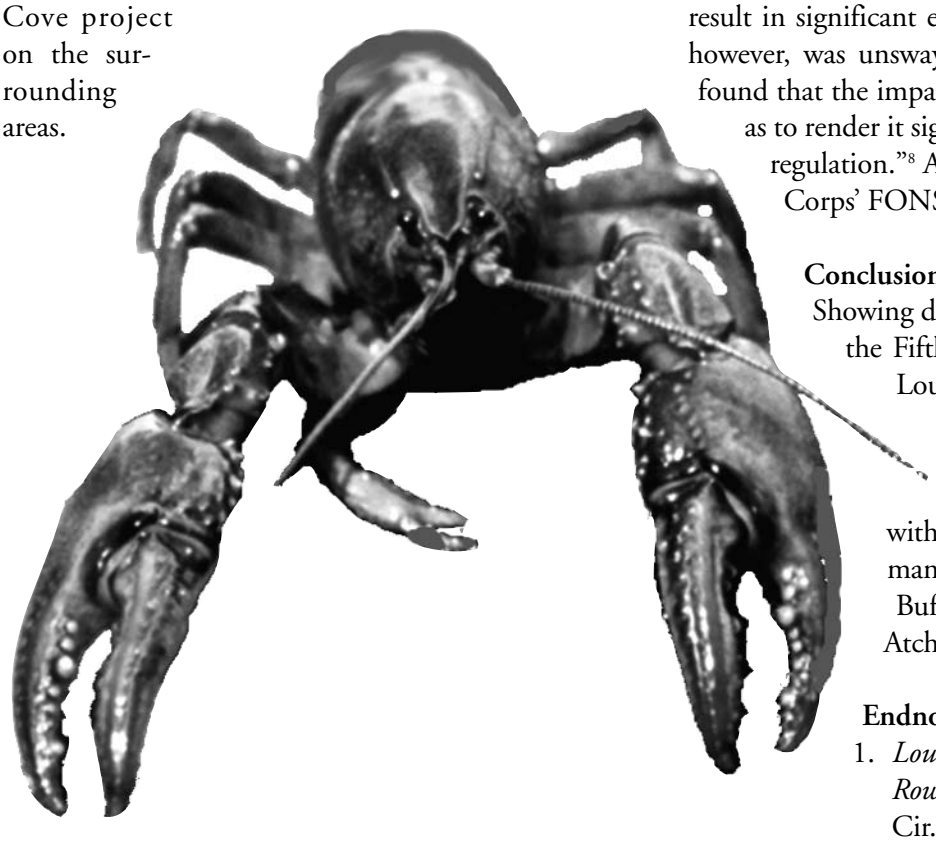
First, the LCPA claimed that the Corps' EA failed to account for the cumulative impact of the Buffalo Cove project on the surrounding areas.



However, the court found that the lengthy discussion in the EA on the cumulative impact of the project was quite adequate. The court also pointed out that with regard to the cumulative impact of future actions, the Corps is only required to consider actions that are "reasonably foreseeable."[6]

Next, the LCPA argued that the original 1982 FEIS, which the Corps' EA relied on, was out of date. The court, relying on precedent, held that "mere passage of time rarely warrants an order to update the information to be considered by the agency."[7]

Lastly, the LCPA asserted that the Corps' FONSI was in error because the Buffalo Cove project would result in significant environmental impacts. The court, however, was unswayed by the LCPA's argument and found that the impact of the project was not "so severe as to render it significant within the meaning of the regulation."[8] Accordingly, the court held that the Corps' FONSI was not arbitrary and capricious.

Conclusion

Showing deference to the Corps of Engineers, the Fifth Circuit denied an appeal by the Louisiana Crawfish Producers Association to overturn the Corps' environmental assessment and Finding of No Significant Impact with regard to its proposed project to manage water flow and sediment in the Buffalo Cove Management Unit of the Atchafalaya Basin.

Endnotes

1. *Louisiana Crawfish Producers Assn. v. Rowan,* 2006 WL 2474845 at *3 (5th Cir. Aug. 29, 2006).
2. *Id.*
3. 42 U.S.C. § 4332(2).
4. *Louisiana Crawfish Producers Assn.* at *4 (citing *Sabine River Auth. v. U.S. Dept. of Interior,* 951 F.2d 669, 677 (5th Cir. 1992)).
5. *Louisiana Crawfish Producers Assn.* at *4.
6. 40 C.F.R. § 1508.7.
7. *Louisiana Crawfish Producers Assn.* at *6 (citing *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011, 1036 (2nd Cir. 1983)).
8. *Louisiana Crawfish Producers Assn.* at *6.

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Conclusion

Having determined that HUD had not acted arbitrarily, capriciously, or contrary to law when it decided that no EIS was required for the St. Thomas project, and that the district court had not committed any reversible error in its consideration of the case, the Fifth Circuit affirmed the agency and the lower court.

Endnotes

1. 5 U.S.C. § 706(2)(A).
2. 42 U.S.C. § 4332(2).
3. 40 C.F.R. § 1500.3.
4. *Dept. of Transportation v. Public Citizen*, 541 U.S. 752, 757 (2004).
5. 16 U.S.C. § 470f.
6. *Id.*
7. *Vieux Carre Prop. Owners Residents and Associates, Inc. v. Pierce*, 719 F.2d 1272, 1281 (5th Cir. 1983).
8. *La. Wildlife Fed. Inc. v. York*, 761 F.2d 1044, 1055 (5th Cir. 1985).
9. *Id.*

Despite Tragedy, Eleventh Circuit Refuses to Second-Guess Coast Guard

***Cranford v. United States*, No. 06-10685, 2006 WL 2827680 (11th Cir. Oct. 5, 2006)**

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Introduction

When Ronald Melech, Howard Melech, and Eddie Cranford went boating on August 9, 2003, they could not have foreseen the hidden danger awaiting them in Mobile Bay. Seventy-three years earlier, the federal Works Progress Administration "deliberately sank" a U.S. Army Mine Planter "to serve as a breakwater" and created what came to be known as the Fort Morgan Wreck.[1] The U.S. Coast Guard first charted and marked the wreck in 1992. Over the years, the Coast Guard modified the original marker from a "temporary lighted buoy" to a piling with two warning signs placed "164 feet north-northwest of the part of the wreck closest to the surface."[2] Only four days before the Cranford-Melech outing, the Coast Guard, in response to numerous reports of collisions with the wreck in recent years, had again changed the marker, "replac[ing] the signs with a flashing light and a six-foot-wide red triangle with the letters 'WR2.'"[3] Like its predecessors, the new marker failed to provide sufficient warning of the danger lurking just beneath the water's seemingly innocuous surface.

As Eddie Cranford and the Melech brothers traveled east across Mobile Bay that Saturday, they could not see the submerged vessel even though parts of the Fort Morgan Wreck rested only six to eighteen inches below the surface. When their seventeen-foot motorboat struck the wreck at thirty miles per hour, Ronald and Eddie were thrown from the boat. Although Howard was eventually able to locate and pull Eddie back into the boat, officials did not find his brother's body until the following day. Eddie Cranford and Howard Melech sued the government for their personal injuries, and Diane Melech sued on behalf of her deceased husband, Ronald. After consolidating the lawsuits, the district court promptly dismissed the claims for lack of subject matter jurisdiction, holding that the Coast Guard had not waived its sovereign immunity.

Sovereign Immunity

Despite the tragic details of their case, Cranford and the Melechs faced the unenviable task of suing the U.S. to recover for their losses. In the opening pages of its opinion the Eleventh Circuit hinted at the futility of the plaintiffs' claims, reminding them that "[t]he United States is immune from suit unless it consents to be sued."[4] The plaintiffs brought their claims under the Suits in Admiralty Act (SAA) and the Public Vessels Act (PVA) which both "provide[ ] a waiver of sovereign immunity . . . for admiralty claims against the United States."[5] Despite this statutory vulnerability in the oth-

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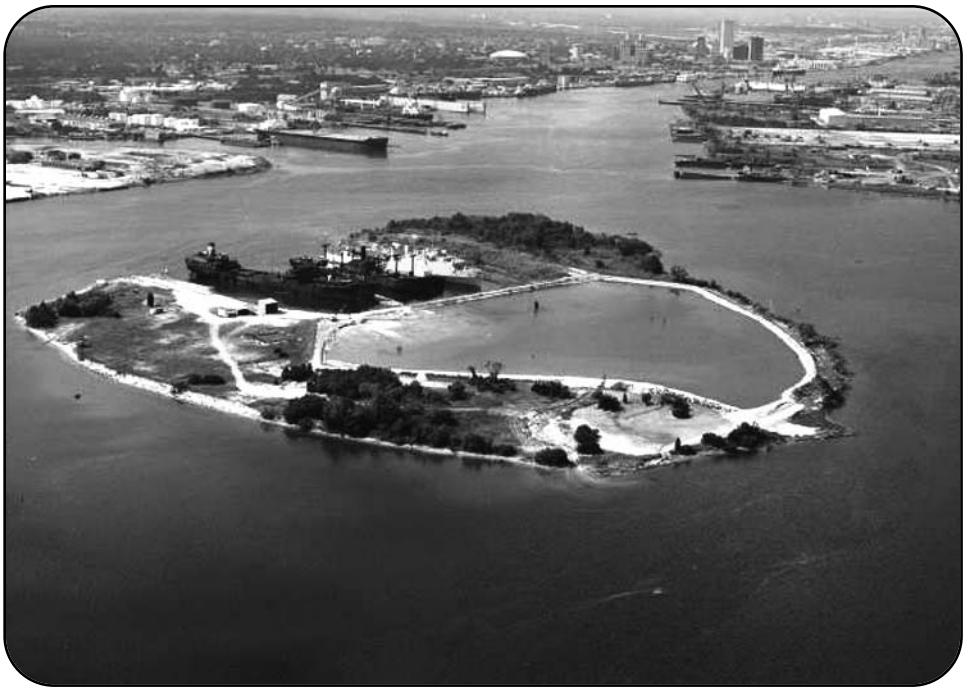
Photograph of Mobile Bay courtesy of Sandia National Laboratories.



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erwise impenetrable shield of the federal government, the Eleventh Circuit warned future plaintiffs against becoming overly optimistic about their chances of prevailing on claims brought against the U.S. because "the waivers [in both the SAA and PVA] are subject to the discretionary function exception of the Federal Tort Claims Act."[6]

The Discretionary Function Exception

The discretionary function exception seeks to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[7] In *U.S. v. Gaubert* the Supreme Court "'developed a two-step test to determine whether the government's conduct meets the discretionary function exception.'"[8] First, courts are required to "consider . . . whether the conduct involves 'an element of judgment or choice.'"[9] If the government adhered to "'a federal statute, regulation, or policy specifically prescrib[ing] a course of action embodying a *fixed or readily ascertainable* standard,'"[10] the conduct will be afforded the protection of sovereign immunity because it did not involve an element of judgment or choice. If not, the conduct still remains eligible for protection if it passes the second step of the *Gaubert* test: if the conduct that involved an element of judgment or choice "is grounded in considerations of public policy,"[11] then the court must find that the conduct remains safely protected from attack behind the shield of sovereign immunity.

Photograph of sunken wreck courtesy of the United States Environmental Protection Agency.

The Marking of the Wreck

Cranford and the Melechs first argued that the Coast Guard should be held liable based on its marking of the Fort Morgan Wreck. In addition to their belief that the Coast Guard had acted negligently by designating the wreck with only one marker, the plaintiffs also faulted the Coast Guard for its careless placement of that marker. Undisputed evidence indicated that the Coast Guard had initially "plac[ed] the marker 164 feet away from the wreck" and had never moved the marker closer to the wreck despite numerous reports of collisions with the wreck over the years.

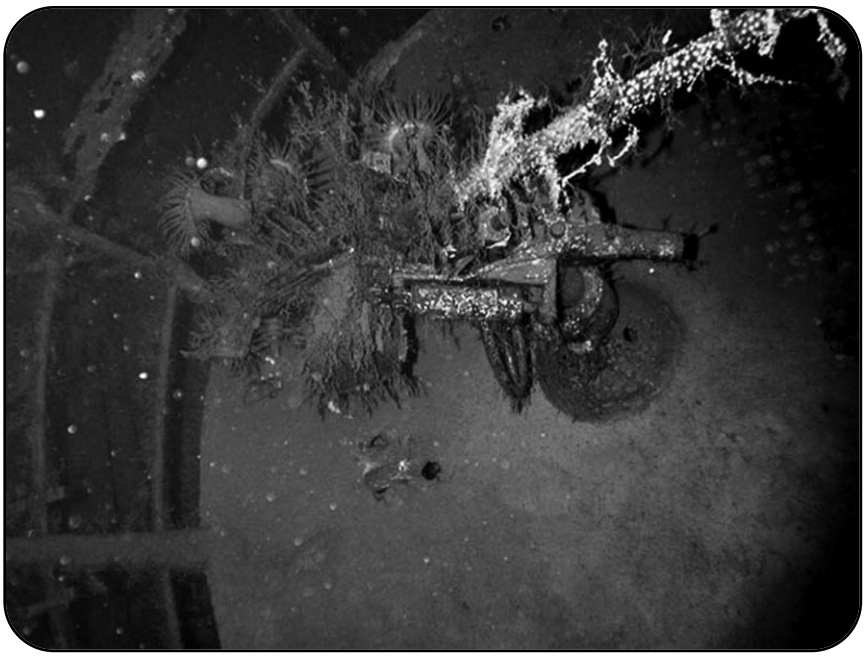
Applying the first step of the *Gaubert* test, the court quickly concluded that the Coast Guard's marking of the wreck "involved elements of judgment or choice."[12] After reviewing applicable statutes, regulations, and internal guidelines, the court noted the "broad discretion [that the Coast Guard had been given] in deciding how to mark a wreck."[13] More importantly, the court noted the plaintiffs' "fail[ure] to identify 'a federal statute, regulation, or policy [that] specifically prescribe[d] a course of action embodying a *fixed or readily ascertainable* standard.'"[14]

The court appeared willing to accept an argument that the Coast Guard failed to ground its decision in considerations of public policy; however, the plaintiffs advanced an ineffective argument that the Coast Guard had considered nothing more than the financial implications of its decision. Although the court agreed with the plaintiffs that "[f]inancial considerations alone may not make a decision one involving policy,"[15] it found the government's argument more persuasive. The government admitted that the Coast Guard had "evaluat[ed] . . . resource constraints," but it also argued that the Coast Guard considered both "the knowledge and customs of international mariners" and the competing "needs of pleasure and commercial watercraft."[16]

Because the Coast Guard's marking of the Fort Morgan Wreck satisfied both the first and second steps of the *Gaubert* test, the court found that the Coast Guard had not waived its immunity.

The Decision Not to Remove the Wreck

Cranford and the Melechs also contended that the Coast Guard waived its immunity by failing to remove the Fort Morgan Wreck because, they claimed, the decision failed the first step of the *Gaubert* test. Pointing to a federal statute that "specifically prescribe[d] a course of action embodying a *fixed or readily ascertainable* standard," the plaintiffs argued that the Coast Guard's decision not to remove the wreck involved an impermissible "element of judgment or choice."[17] The plaintiffs argued that section 409 of the Wreck Act "impose[d] a nondiscretionary duty on the government to remove the . . . [w]reck" because of its prohibition against obstructing waters and the



Photograph of sunken wreck courtesy of NOAA's Ocean Explorer.

requirement that "owners promptly . . . remove sunken vessels."[18]

The Eleventh Circuit applied a textual interpretation to dismiss the plaintiffs' argument. First, the court reasoned that because the Wreck Act was enacted as part of the Rivers and Harbors Appropriation Act of 1899, the court had an obligation "to read [section 409] together with the other sections of that statute."[19] Since section 403 "authorize[d] the creation of obstructions, including breakwaters," the court concluded "it would be absurd to read section 409 to require the government immediately to remove a vessel that it deliberately sank for a public purpose."[20] Finally, the court disagreed with the plaintiffs that section 409 imposed on the Coast Guard a nondiscretionary duty to remove the wreck. Because the last clause of section 409 explained that failure to remove a sunken vessel would merely "*subject* the [vessel] to removal by the United States,"[21] the Eleventh Circuit interpreted such removal as discretionary.

The Eleventh Circuit did not analyze the Coast Guard's decision not to remove the wreck under the second step of the *Gaubert* test since the plaintiffs conceded that the government's intentionally sinking a vessel to serve as a breakwater represented a decision that clearly contemplated public policy considerations.

Conclusion

The federal government's shield of sovereign immunity, though not impenetrable, has few weaknesses, and one of those weaknesses, waiver, boasts its own defense in the form of the discretionary function exception. Designed to prevent judicial second-guessing of legislative and administrative decisions, the discretionary function exception achieved its purpose in *Cranford*. Having found both of the plaintiffs' claims subject to the exception, the Eleventh Circuit affirmed the district court's dismissal of the case for lack of subject matter jurisdiction. The court acknowledged the horrific details of the Cranford-Melech tragedy, but the discretionary function exception's application prevented the Eleventh Circuit from second-guessing either the Coast Guard's marking of the Fort Morgan Wreck or its decision not to remove the wreck.

Endnotes

1. *Cranford v. U.S.*, No. 06-10685, 2006 WL 2827680 at *1 (11th Cir. Oct. 5, 2006).
2. *Id.*
3. *Id.*
4. *Id.* at *2.
5. *See* Suits in Admiralty Act, 46 U.S.C. app. §§ 741-52 (2000) (covering claims that do not involve public vessels); Public Vessels Act, 46 U.S.C. app. §§ 781-90 (2000) (covering claims that do involve public vessels).
6. *Cranford* at *2.
7. *Id*. at *3 (quoting *U.S. v. Gaubert*, 499 U.S. 315, 322-23 (1991)).
8. *Cranford* at *2.
9. *Id.*
10. *Id.*
11. *Id.* at *3.
12. *Id.* at *4.
13. *Id.*
14. *Id.* (2d alteration in original).
15. *Id.* at *5 (alteration in original).
16. *Id.* at *4.
17. *Id.* at *2.
18. *Id.* at *5.
19. *Id.*
20. *Id.*
21. *Id.* (emphasis added) (alteration in original).

Fifth Circuit Upholds Forum-Selection Clause in Ship Deal

***Hellenic Investment Fund, Inc. v. Det Norske Veritas*, 2006 WL 2567462 (5th Cir. Sept. 7, 2006)**

Allyson L. Vaughn, 3L, University of Mississippi School of Law

In September the U.S. Court of Appeals for the Fifth Circuit held that the purchaser of a cargo ship was subject to the terms of a forum selection clause contained in a contract between the seller and a classification society.

Background

Hellenic Investment Fund, Inc. (Hellenic) purchased a cargo ship, the M/V *Marianna*, from the ship-owning company Inlet Navigation Company (Inlet). Inlet contracted with Det Norske Veritas (DNV), an international classification society, to class the ship before, during, and after the sale. Hellenic relied upon DNV's issuance of a clean class confirmation certificate in purchasing the ship. After the purchase was completed, the ship, which was renamed the M/V *Tranquillity*, underwent inspection by Hellenic's insurance company, the P&I Club. This inspection revealed deficiencies that DNV should have discovered, and resulted in problems obtaining insurance coverage for an impending voyage. The ship was sent on at least two voyages and underwent port-state control inspection in Montreal, Canada, which also raised concerns regarding its condition. Hellenic ultimately sold the *Tranquillity*.

Hellenic, relying on the Fifth Circuit's decision in *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*,[1] filed claim in the U.S. District Court for the Southern District of Texas against DNV for fraudulent misrepresentation in the classification documents. The classification certificate provided that it was issued under the DNV's Rules. The Rules contained a forum-selection clause providing that any dispute related to the Rules must be resolved by the Municipal Court of Oslo, Norway. DNV moved for dismissal and sought to enforce the clause. The District Court found that Hellenic, although not a signatory to the DNV-Inlet contract, was bound by the terms of DNV's Rules and dismissed the suit. Hellenic then appealed to the Fifth Circuit on the grounds that enforcing the forum-selection clause was unreasonable under the circumstances.

The Court's Analysis

Federal courts have held that if some written agreement to arbitrate exists, third parties may be held to submit to arbitration, although such arbitration agreements apply to third parties only in rare circumstances.[2] There are six recognized theories to bind a nonsignatory to an arbitration agreement: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter-ego, (5) estoppel, and (6) third-party beneficiary. DNV argued at trial that Hellenic is bound to the clause under the theories of estoppel, third-party beneficiary and implied-in-fact contract. The Court of Appeals discussed only the estoppel claim.

Estoppel

Direct-benefit estoppel "involve[s] non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status, but then, during litigation attempt to repudiate the arbitration clause in the contract."[3] Hellenic argued that the doctrine did not apply for two reasons: (1) they received no benefit from the services of DNV, and (2) the suit is based on negligent misrepresentation, not a contract claim.

The court relied on the Second Circuit decision in *American Bureau of Shipping v. Tencara Shipyard S.P.A.*[4] to reject Hellenic's claims. The facts of that case are very similar to those in the case at hand. The Second Circuit applied direct-benefit estoppel to "bind non-signatory vessel owners to a forum-selection clause in a contract between the classification group and shipyard."[5] The court also held that because of the contract between the classification society and the shipyard, the owners operated the ship under the French flag more cheaply, thus benefiting directly from the contract. The benefit the owners received from the contract between the other two parties was sufficient to bind them to the contract's arbitration clause.

The Fifth Circuit turned to the record to support its finding that Hellenic benefited from the contract between DNV and Inlet. Hellenic admitted that had the condition of class (certificate) not issued it would

not have purchased the ship.[6] Additionally, Hellenic's complaint stated that DNV should have known its representations were for the "guidance and *benefit*" of Hellenic in a business transaction.[7] Therefore, by DNV performing the conditions of the contract with Inlet, Hellenic benefited at the time of purchase.

The court also rejected Hellenic's argument that the claim is not founded in contract law. Hellenic's claim resulted from DNV's failure to follow its own rules when classifying the ship. The same Rules by which Hellenic alleged DNV made the misrepresentations contain the forum-selection clause. The court found that "Hellenic cannot embrace the Rules by bringing a claim . . . alleging, in essence, a violation of the DNV Rules without accepting the consequences of those Rules."[8]

Therefore, Hellenic was estopped from rejecting the contract and the included forum-selection clause.

Enforcement

Hellenic further maintained that the forum-selection clause was not enforceable because it was unreasonable under the circumstances.[9] Hellenic based this claim on the grounds that the clause was not a negotiated term between Hellenic and DNV. However, the Fifth Circuit has continually relied on the Supreme Court's holding that "a nonnegiotated forum clause . . . is never enforceable simply because it is not the subject of bargaining."[10] The court supported its finding with the undisputed fact that Hellenic had actual knowledge that the DNV Rules applied. Hellenic's knowledge along with the presumption that federal courts "must enforce forum selection clauses in international transactions" supported the court in finding the DNV forum-selection clause enforceable in this case.

Conclusion

The Fifth Circuit found that the district court properly dismissed the suit and enforced the forum-selection clause.

Endnotes

1. 346 F.3d 530 (5th Cir. 2003).
2. *Bridas S.A.P.I.C. v. Govt. of Turkm.*, 345 F.3d 347, 358 (5th Cir. 2003).
3. *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001).
4. 170 F.3d 349 (2d Cir. 1999).
5. *Hellenic*, 2006 WL 256742 at *3.
6. *Id.* at *4.
7. *Id.*
8. *Id.*
9. Hellenic relied on *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972), for the theory that forum-selection clauses, "although prima facie valid," should not be enforced if "enforcement is shown by the resisting party to be unreasonable under the circumstances."
10. *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991).

Photograph of cargo ship courtesy of The National Science Foundation.

La. Court Finds No Right to Fish, Hunt on River

***Parm v. Shumate*, Civ. Action No. 01-2624 (W.D. La. Aug. 29, 2006)**

Josh Clemons

On August 29 the U.S. District Court for the Western District of Louisiana, Monroe Division, issued an opinion declaring that there is no federal common law or state law right to fish and hunt on the Mississippi River when it inundates privately owned land. The opinion has attracted considerable notice in the region, where such a right has often been taken for granted.

Background

For several years fishing and hunting enthusiasts, including the plaintiffs in this case, have sought to enjoy their sports on Gassoway Lake and adjacent small water bodies (collectively, Gassoway Lake) in East Carroll Parish, Louisiana. Gassoway Lake is an oxbow-type lake that was formed when the main channel of the Mississippi River meandered westward in the 1860s and 1870s, then migrated back to the east by the end of the 1800s. When the river moved eastward the lake was isolated from the main channel.

The Mississippi River is now three and a half miles east of Gassoway Lake. The lake is accessible by boat only when the river is at its annual flood height. During other parts of the year the lake is essentially landlocked. The plaintiffs would access Gassoway Lake by floating to it while the river is high.

The land surrounding and underlying Gassoway Lake belongs to Walker Lands, Inc. Walker Lands has attempted to exclude people from the lake by posting signs and, more actively, by filing trespassing charges with the sheriff of East Carroll Parish.[1] The plaintiffs in this case were among those arrested by the sheriff for trespassing.

The plaintiffs filed suit, asking the court to (1) find that the sheriff lacked probable cause to arrest them under the Louisiana trespass statute,[2] (2) declare that the sheriff could not prove that the plaintiffs were, beyond a reasonable doubt, guilty of trespass, and (3) issue a permanent injunction prohibiting the sheriff from enforcing the trespass statute on Gassoway Lake.

The case was first heard by Magistrate Judge James D. Kirk, who issued a report and recommendation.

The Magistrate's Recommendation

The legal question before Magistrate Judge Kirk was this: "whether the public, including the Plaintiffs, have the federal right or state right to navigate, fish and hunt, and otherwise exploit, enjoy and utilize the full water surface of the Mississippi river at its normal water heights."[3] Magistrate Judge Kirk began by examining the plaintiff's rights under the federal statutes and the federal navigational servitude.

When new states are admitted to the Union, they take title to the land and waters within their boundaries. However, the federal government retains the authority to ensure that all navigable waterways remain navigable as "highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[4] This restriction, which has its roots in Congress' constitutional authority to regulate interstate commerce, is known as the federal navigational servitude.

The servitude has been codified in 33 U.S.C. § 10: "[a]ll the navigable waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways." Magistrate Judge Kirk opined that the statute only protects the public right to navigate on the river; it does not grant the right to fish and hunt. Similarly, the federal navigational servitude itself focuses on the protection of navigation for commercial purposes and not on hunting and fishing.

However, Magistrate Judge Kirk found that federal common law (case law) recognizes a right of navigation that includes hunting and fishing, which extends to the high water mark. The cases Magistrate Judge Kirk cited in support of this right were the 1824 U.S. Supreme Court decision in *Gibbons v. Ogden*, which established the right of all persons to the use of open navigable waters, and the 1931 Fifth Circuit decision in *Silver Springs Paradise Co. v. Ray*, in which that court declared that the public right of navigation "entitles the public generally to the reasonable use of navigable waters for all legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as for carrying persons or property for hire, and in any kind of water craft the use of which is consistent with others also enjoying the right possessed in common."[5] Magistrate Judge Kirk interpreted these two cases as establishing the right.

Magistrate Judge Kirk also examined state law. The Louisiana Civil Code provides the public right to use the state's navigable waters, at any stage. Furthermore, Louisiana case law has recognized the public's "traditional right to fish from boats in the navigable waters of the state."[6] Magistrate Judge Kirk noted that other statutes concerning the public's right to use marine waters reflected Louisiana's "strong public policy regarding citizens' rights to fish in public waters" including fresh waters.[7] He concluded that, under Louisiana law, the public has the right to use the Mississippi River up to the ordinary high water stage for "at the very least, those traditional uses of navigation (including travel and transportation), commerce, boating, sailing, and fishing and hunting from boats."[8]

Based on this reasoning, the magistrate judge recommended that the district court enter judgment in favor of the plaintiffs, and declare that they are entitled by state and federal law to use the Mississippi River for boating, fishing, and hunting up to the ordinary high water stage.

The District Court's Decision

Judge Robert James of the U.S. District Court adopted some of Magistrate Judge Kirk's recommendations and rejected others. Judge James agreed that neither the federal statutes nor the federal navigational servitude conferred a right on the public to fish and hunt on the Mississippi River. Judge James also agreed that the public has a right to use the river up to the ordinary high water mark when it inundates private lands.

However, Judge James did not agree that the public's right to use the river encompasses fishing and hunting. With respect to the federal common law right, Judge James took issue with Magistrate Judge Kirk's interpretation of the *Silver Springs* case. Judge James chose not to interpret *Silver Springs* as expansively as Magistrate Judge Kirk did. Because "the Fifth Circuit did not specifically find that the public has a federal common law right to fish or hunt on a navigable source of water" Judge James reasoned that the right was limited to "legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as carrying persons or property for hire."[9]

Judge James also rejected Magistrate Judge Kirk's reasoning that the plaintiffs had a state law right to hunt and fish from their boat over inundated private lands. Judge James based his reasoning on a Comment to the section of the Louisiana Civil Code that provides for the public right of navigation. The Comment states that the right "is not for the use of the public at large for all purposes but merely for the purposes that are incidental to the navigable character of the stream and its enjoyment as an avenue of commerce."[10] Citing Second Circuit and Louisiana precedent in support of his position, Judge James declared that hunting and fishing are not incidental to navigation and the public therefore has no right to engage in those activities on inundated private land. For that reason, the court ruled that the sheriff had probable cause to arrest the plaintiffs for trespass.

Photograph of wild turkey courtesy of the Louisiana Department of Wildlife and Fisheries.

Conclusion

This case has sparked much discussion in the region because it runs counter to what many considered to be the settled state of affairs, which was that one may fish or hunt from a boat on any navigable waters that one can lawfully access. The plaintiffs petitioned the

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Fifth Circuit Affirms Decision in Mississippi River Ship Collision Case

***Bertucci Contracting Corp. v. M/V* Antwerpen, No. 04-31200 (5th Cir. Sept. 19, 2006)**

Josh Clemons

In September the U.S. Court of Appeals for the Fifth Circuit affirmed an admiralty decision from the U.S. District Court for the Eastern District of Louisiana in New Orleans. The case involved an allision of vessels on the Mississippi River.

Background

This legal dispute arose from a vessel collision that occurred on January 19, 2003 on the Mississippi River near New Orleans. In the wee hours of that fateful morning there were several vessels navigating the Carrollton Bend, near Nine Mile Point, below the Huey P. Long Bridge. Headed downbound (south) were the *Bayou Black*, the *Beverly Anderson*, and the tugboat *Lady Jeanette*, which was pushing four loaded barges in two-by-two configuration. Headed in the opposite direction were the *Alice Hooker* and the *Antwerpen*, an enormous oceangoing bulk freighter.

The *Lady Jeanette*'s captain, Kenneth Ayars, and the *Antwerpen*'s river pilot, Teal Grue, communicated by radio about the best way to pass each other on the crowded river. Pilot Grue planned to overtake the *Alice Hooker* as she held up on the river's west bank, then pass the *Beverly Anderson* starboard-to-starboard (a "two-whistle" passing). Pilot Grue and Captain Ayars agreed to have their vessels pass each other port-to-port (a "one-whistle" passing).

The *Lady Jeanette* and the *Antwerpen* passed each other without incident. Immediately after the passage, however, the *Antwerpen* allided with a stationary fleet of barges along the left descending bank across from Nine Mile Point. The barges were owned by Bertucci Contracting, Inc. (Bertucci). The *Antwerpen* was owned by the Marvita Shipping Company (Marvita).

Bertucci sued Marvita and the *Antwerpen* (*in rem*) for damages from the crash. Marvita said that the *Lady Jeanette* broke the passing agreement by heading directly at the *Antwerpen* instead of sticking close to shore, and that this action forced Pilot Grue to maneuver the *Antwerpen* in such a way that allision with the barges was inevitable. Captain Ayars disputed this characterization of the event, saying that he had set his course in such a way that it would have been impossible to collide with the *Lady Jeanette*.

Marvita filed a third-party complaint and a separate admiralty claim against the *Lady Jeanette*, its owner, and its operator (collectively, *Lady Jeanette*). These claims were consolidated for the trial. Bertucci and Marvita settled their dispute, so only Marvita's claims against the *Lady Jeanette* were tried.

At trial, the district court found that Pilot Grue caused the allision by failing to maintain proper steerageway,[1] and that the *Lady Jeanette* had abided by the passing agreement. The court entered judgment for the *Lady Jeanette*. Marvita appealed the judgment to the Fifth Circuit.

The appeals court held that the full context of Ayars' statements supported the district court's finding.

Fifth Circuit Decision

Marvita asserted on appeal that a new trial was necessary because the *Lady Jeanette* created the risk of allision and violated several navigation rules as a matter of law. Marvita argued that it was therefore up to the *Lady Jeanette* to prove that her actions were not contributory and proximate causes of the allision.

To prevail before the appeals court, Marvita would have to show that the district court's factual findings were clearly erroneous. This standard is a formidable one to meet, particularly when, as here, much of the

evidence is testimony. The appeals court will give great deference to the fact that the finder of fact – here, the trial court – was able to observe the witnesses directly and judge their credibility.

Marvita set out to convince the appeals court that Captain Ayars' own testimony established that he did *not* comply with the passing agreement and violated at least one of four Inland Navigational Rules: Rule 7 (Risk of Collision), Rule 8 (Action to Avoid Collision), Rule 9 (Narrow Channels), and/or Rule 14 (Head-on Situation).[2] According to Marvita, the *Lady Jeanette* created a risk of collision which, by the rules of navigation, requires the vessels to turn to starboard and pass each other on the port side. Marvita alleged that the *Lady Jeanette* turned to port instead. Marvita argued that the evidence at trial required the district court to find that the *Lady Jeanette* violated at least one navigational rule, which would then trigger analysis under the *Pennsylvania* rule, by which the *Lady Jeanette* would have to prove that her navigation was not a contributory and proximate cause of the allision.[3] Therefore, Marvita asserted, a new trial was necessary.

The appeals court examined the contested evidence piece-by-piece. Marvita offered evidence to show that the *Lady Jeanette* had failed to navigate close to the right descending bank, as had been agreed upon by Captain Ayars and Pilot Grue. Captain Ayars contradicted that evidence with testimony and sketches of the position of the ships' lights during the maneuver. The appeals court, unconvinced by Marvita's version of the conflicting evidence, deferred to the district court's acceptance of Captain Ayars' testimony.

Marvita also pointed out that Captain Ayars had admitted to violating the passing agreement when he testified that he "fell off" Nine Mile Point, which would indicate that he had not navigated close to the right descending bank.[4] The appeals court, implying that Marvita was cherry-picking testimony, observed that Captain Ayars had given additional testimony that provided context to his "fell off the point" statement. The appeals court held that the full context of Ayars' statements supported the district court's finding.

There was additional support for the district court's finding. Neither vessel's deck log recorded an incident, which would have likely been the case if there had been a close call like the one Marvita alleged. Radio transmissions provided conflicting evidence: at one point in the maneuver Pilot Grue expressed doubt to the *Lady Jeanette* about her navigation, but the appeals court noted that he never asked for more room, and that Captain Ayars radioed that Grue's vessel had ample room. The appeals court found Marvita's heavy reliance on one particular transmission, in which Grue says "hard over…laying beside me," combined with Grue's assertion at trial that he never would have said that if the vessels were at a safe distance, to be misplaced. Giving considerable deference to the trial court, the appeals court declared that "the district court was free to weigh the evidence as it saw fit and did not have to credit Pilot Grue's testimony."[5]

Photograph of barge approaching Huey P. Long Bridge courtesy of New Orleans Baton Rouge Steamship Pilot Examiners.

At trial the *Lady Jeanette* had also introduced expert testimony from a Captain Strouse, who presented his opinion that the *Antwerpen* went off course because it failed to maintain steerageway, which allowed the current to push the vessel towards the bank. This testimony contradicted that of the captain of the *Alice Hooker*, who praised Pilot Grue's efforts and in doing so suggested that the *Lady Jeanette* was at fault. Nonetheless, the appeals court remained unconvinced that the district court had erred by accepting Captain Strouse's testimony.

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court to reconsider, and Judge James reaffirmed his opinion. The plaintiffs have appealed the case to the U.S. Court of Appeals for the Fifth Circuit. *Water Log* will continue to follow its progress.

Endnotes

1. The sheriff is Mark W. Shumate, the named defendant in the case.
2. "No person shall enter upon immovable property owned by another without express, legal, or implied authorization." La. R.S. 14:63(B).
3. *Parm v. Shumate*, 2006 WL 2513856 at *4 (W.D. La. April 21, 2006) ("Magistrate's Report").
4. *Id.* at *5 (quoting *The Daniel Ball*, 77 U.S. 557 (1870)).
5. *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356 (5th Cir. 1931).
6. *State v. Barras*, 615 So. 2d 285 (La. 1993).
7. Magistrate's Report at *11.
8. *Id.*
9. *Parm v. Shumate*, Civ. Action No. 01-2624 at 7 (W.D. La. Aug. 29, 2006).
10. La. Civ. Code art. 456, comment (b) (internal quotes omitted).

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Marvita also attempted to convince the appeals court that the *Lady Jeanette* had violated specific Navigation Rules governing passage in narrow channels and the risk of collision. Once again, the appeals court observed that the district court could have plausibly credited the *Lady Jeanette*'s evidence that she passed safely in the channel and that the two vessels were never at risk of colliding.

Marvita finally argued a point of law: that the district court had misunderstood the meaning of the term "risk of collision." According to Marvita the lower court had mistakenly believed that "risk of collision" meant that a collision had to be imminent. However, the district court found that even the *risk* of collision was not imminent, so Marvita's argument, even if valid, was unavailing.

Conclusion

Despite Marvita's efforts, the Fifth Circuit was not convinced that the district court's findings and conclusions of law were clearly erroneous. The judgment in favor of the *Lady Jeanette* was affirmed.

Endnotes

1. Steerageway is "the minimum rate of motion needed to maneuver the vessel." *Bertucci Contracting Corp. v. M/V Antwerpen*, No. 04-31200, at 11 (5th Cir. Sept. 19, 2006).
2. 33 U.S.C. §§ 2007-9, 2014.
3. See *The Pennsylvania*, 86 U.S. 125 (1873).
4. *Bertucci Contracting Corp.* at 10.
5. *Id.* at 11.

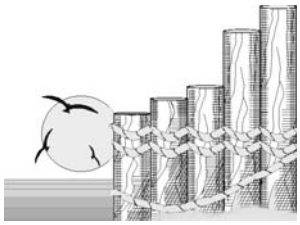
Publication Announcement

The Mississippi-Alabama Sea Grant Legal Program is pleased to announce the publication of an article by research associate Jim Farrell and Marie Quintin, *A Practitioner's Guide to Protecting Wetlands in a Post-Rapanos World*, 36 Environmental Law Reporter 10814 (2006).

The recent plurality opinion of the U.S. Supreme Court in *Rapanos v. United States* left questions about federal jurisdiction under the CWA. Justice Scalia's plurality opinion calls for a limited approach when analyzing which wetlands fall within the jurisdiction of the U.S. Army Corps of Engineers; however, Justice Kennedy's concurrence requires a "significant nexus" standard.

In this article, Farrell and Quintin help clarify the opinion and examine its impact on determining jurisdiction over wetlands. The authors first explain how to construe a plurality opinion. The article then explains the tests outlined by both Justices. The article also contains a "jurisdictional wetlands test," to help determine whether the federal government has jurisdiction over wetlands. The appendix provides a useful chart comparing the language used by Justice Scalia and Justice Kennedy.

Interesting Items



Around the Gulf…

Gulf LNG has signed an agreement with the Port of Pascagoula and the Jackson County (Miss.) Board of Supervisors to lease one hundred acres for a **liquefied natural gas terminal.** Although it will take at least three years to construct the $600 million facility, the county and the port will begin enjoying monetary benefits much sooner than that. During construction of the terminal the port will receive $233,000 per year, and the Mississippi Tidelands Trust Fund will receive $116,000 per year. Those figures will increase to $500,000 per year after the terminal is complete. The county will collect taxes during construction as well. Schools are expected to receive about $5.6 million per year after the plant is up and running.

Several of the Gulf region's most prominent institutions of higher learning have joined forces to form the **Northern Gulf Institute** to study ecological and environmental issues of interest to the region. Members of the Institute include the Dauphin Island Sea Lab, the University of Southern Mississippi, Mississippi State University, Louisiana State University, and Florida State University. The Institute will work with the National Oceanic and Atmospheric Administration (NOAA). Most of the Institute's scientists will work out of the Stennis Space Center in Hancock County, Mississippi.

Environmental groups are suing the National Marine Fisheries Service (NMFS) to stop the fishing of one of the Gulf's tastiest species, the **bluefin tuna.** Earthjustice (the legal arm of the Sierra Club) and the Blue Ocean Institute took action after NMFS refused their petition to close 125,000 square miles of the Gulf to fishing when the tuna are spawning. While it is already illegal to fish directly for bluefin in U.S. waters, many of the increasingly valuable fish are taken incidentally by fishers pursuing other species. These bluefin are then sold, legally, in U.S. ports. The environmental groups argue that NMFS is required to put a stop to this trade. Bluefin stocks have been declining for over twenty years, the groups say.

The Mississippi Department of Environmental Quality (MDEQ) has levied a **$65,000 fine** against the DuPont Corp. for permit violations at its First Chemical plant in Pascagoula. The violations included failure to record information, damage to the groundwater remediation system, failure to timely test smokestack emissions, and excessive release of chlorine. The violations are not thought to have affected the environment significantly. DuPont officials say they have addressed and resolved the problems.

NOAA is building a **new $15 million vessel** to map the ocean floor, and the task of designing and constructing the ship is being undertaken by Mississippi shipbuilder VT Halter Marine. The *Swath CMV* will feature side-scan and multi-beam sonar, which will be used in NOAA's ongoing efforts to survey the ocean floor and keep nautical maps up-to-date.

The U.S. Department of Energy is considering additional Gulf region locations for the **Strategic Petroleum Reserve.** The five sites being considered are the Richton salt dome in Richton, Mississippi; the Bruinsburg salt dome near Vicksburg; the Chacahoula and Clovelly domes in Lafourche Parish, Louisiana; and Stratton Ridge in Brazoria County, Texas. The Strategic Petroleum Reserve stores crude oil for times of emergency. Salt caverns are used because of their security and low cost.

Around the country…

The humble **bluegill** (a.k.a. bream or sunfish), familiar to freshwater cane-pole anglers everywhere, is helping fight terrorism in our big cities. Because of their sensitivity to certain toxins that could be used in a terror attack, the brave fish are being used to monitor municipal drinking water supplies in places like New York City, San Francisco, and Washington D.C. The fish perform the same noble duty as the proverbial canary in the coal mine.

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... Upcoming Conferences ...

•JANUARY 2007 •

4th Intl Conference on Remediation of Contaminated Sediments
January 22-25, 2007, Savannah, GA
http://www.battelle.org/sedimentscon

Third National Water Resources Policy Dialogue
January 22-23, 2007, Arlington, VA
http://www.awra.org/meetings/DC2007/index.html

•FEBRUARY 2007 •

Environmental and Toxic Tort Litigation
February 1-2, 2007, New Orleans, LA
http://ali-aba.org

Aquaculture 2007: Science for Sustainable Aquaculture
February 26-March 2, 2007, San Antonio, TX
http://www.was.org

•MARCH 2007 •

Coastal Geotools '07
March 5-8, 2007, Myrtle Beach, SC
http://www.csc.noaa.gov/geotools/

Paying for Sustainable Water Infrastructure
March 21-23, 2007, Atlanta, GA
http://www.payingforwater.com

The SoL Forum on Business Innovation for Sustainability
March 27-30, 2007, Atlanta, GA
http://www.solsustainability.org/

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