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Expansion of Strategic Petroleum Reserve Under Fire

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In February 2007, the Department of Energy (DOE) announced that Richton, Mississippi would be the site for the expanding facilities of the U.S. Strategic Petroleum Reserve (SPR). Public reaction to the announcement has been strong. Many Gulf Coast residents were completely unaware of the existence of the project as the first round of environmental assessments began in September 2005, just weeks after Hurricane Katrina. Bowing to public pressure, the DOE announced in March 2008 that it would prepare a supplemental environmental impact statement for its selection of the Richton site. Public hearings were held in early April.

Expansion of the SPR

The SPR was established following the 1973-1974 oil embargo as insurance against future disruptions of the supply chain. According to DOE, the Gulf of Mexico was the logical choice for the SPR.[1] The Gulf Coast is home to many U.S. refineries and distribution points and there are more than 500 salt domes along the coast,[2] which when hollowed out create natural storage tanks. The current capacity of the SPR, which consists of four storage facilities in Louisiana and Texas, is 727 million barrels of oil with an inventory of 688.5 million barrels. To date, the SPR has been tapped into twice: during Operation Desert Storm in 1991 and after Hurricane Katrina in 2005.

In 1988, at the request of Congress, the DOE began planning for the expansion of the SPR. In 1992, the DOE prepared a *Draft Environmental Impact Statement on the Expansion of the Strategic Petroleum Reserve* (DEIS) which assessed five candidate sites for the expansion of the SPR to 1 billion barrels: Big Hill, Texas; Stratton Ridge, Texas; Weeks Island, Louisiana; Cote Blanche, Louisiana; and Richton, Mississippi.[3] Because the SPR was not yet filled to capacity, however, the DOE did not take any action following the release of its DEIS.

In the Energy Policy Act of 2005 (EPAct), Congress directed the Secretary of Energy to expand the capacity of the SPR to 1 billion barrels and to fill it completely.[4] Expansion sites were to be selected from sites previously considered by the DOE or proposed by a state where a site had been previously studied.

See Richton Salt Dome, page 6

Fifth Circuit Upholds Wetlands Convictions

***United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008).**

Sarah Spigener, 3L, University of Mississippi School of Law

Photograph of Mississippi coastal river marsh courtesy of the Mississippi Department of Marine Resources.

In February, the Fifth Circuit Court of Appeals upheld the convictions of Robert Lucas, Jr., Robbie Lucas Wrigley, and M.E. Thompson, Jr. for Clean Water Act violations, conspiracy, and mail fraud. Lucas, Wrigley, and Thompson sold uninhabitable mobile home lots in Vancleave, Mississippi after misrepresenting the wetland characteristics of the lots and improperly certifying the septic tanks, many of which later failed.

Background

Robert Lucas, Jr., through his companies Big Hill Acres, Inc. (BHA, Inc.) and Consolidated Investments, Inc., bought a large tract of land in Jackson County, Mississippi which he called Big Hill Acres (BHA). The property was subdivided for development as mobile home lots that would be sold under long-term installment plans. Lucas' daughter, Robbie Lucas Wrigley, was in charge of advertising and selling the lots.

Since the property was not connected to a municipal waste system, Jackson County law required Lucas to install individual septic systems on each lot. Prior to sale, the septic systems must be certified by an engineer with the Mississippi Department of Health (MDH) or an independent licensed engineer. Lucas ran into trouble almost immediately. Lucas' first engineer, who worked for MDH, discovered the lots were on saturated soils and the agency withdrew its preliminary approvals. Lucas subsequently hired M.E. Thompson, Jr., a private licensed engineer, to approve the systems.

In 1997, Lucas received a letter from the MDH ordering him to cease and desist from installing septic tanks that did not comply with state and federal statutes. Letters from the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) instructed Lucas to end the unpermitted filling of wetlands in 1999. When Lucas failed to comply, the federal government filed indictments against Lucas, the companies, Thompson, and Wrigley (collectively, the "Defendants") alleging violations of the Clean Water Act (CWA) § 404 (dredge and fill) and § 402 (NPDES program), mail fraud, and conspiracy to commit mail fraud and to violate the CWA.

The jury convicted the Defendants on all charges. Lucas was sentenced to 108 months of imprisonment, a fine of $15,000, and three years probation. Thompson and Wrigley were each sentenced to 87 months of imprisonment, a fine of $15,000, and three years probation. BHA, Inc. was fined $4.8 million and Consolidated Investments, Inc. was fined $500,000. Moreover, both companies were sentenced to five years probation. An addition-

al $1,407,400 in restitution was assessed against each defendant. The Defendants appealed their convictions to the Fifth Circuit.

Clean Water Act

One of the Defendants' primary arguments was that there was insufficient evidence to establish jurisdiction over the property under the CWA. The CWA grants the Corps and EPA jurisdiction over the "waters of the United States" or navigable waters. Wetlands adjacent to navigable waters qualify as "waters of the United States."[1] The jurisdictional reach of the CWA was most recently addressed by the Supreme Court in *Rapanos v. U.S.*[2] A four-justice plurality defined waters of the U.S. as "relatively permanent, standing or flowing bodies of water" and wetlands with "a continuous surface connection" to such waters.[3] Justice Kennedy, in a concurring opinion, argued that jurisdiction is only proper if there is a "significant nexus" between a wetland and a traditional navigable water.[4] A significant nexus can be determined by investigating whether "wetlands, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable."[5]

The Fifth Circuit concluded that the evidence presented at trial was sufficient to prove jurisdiction under either of the above tests. First, the plurality was satisfied because there was "flowing open water" on portions of the property and "a continuous band of wetlands and streams and creeks that lead from the site to [the navigable] Tchoutachabouffa River, the Pascagoula River, and the Mississippi Sound."[6] The court also determined that Justice Kennedy's test was satisfied because the BHA wetlands control flooding in the area and prevent pollution in downstream waters.

NPDES Permitting

The Defendants also argued that their convictions for violations of § 402 were improper because they were not required to obtain National Pollutant Discharge Elimination System (NPDES) permits for the septic tanks. The CWA requires permits for the discharge of pollutants from point sources into waters of the U.S. "Point sources" are defined as "any discernible, confined, and discrete conveyance…from which pollutants are or may be discharged."[7] Owners or operators of treatment works treating domestic sewage must meet additional sewage sludge requirements.[8] Septic systems are excluded from the definition of "treatment works."[9] The Defendants claimed that the exclusion of septic systems from the sewage sludge requirements excluded septic systems from the *entire* NPDES program. The Fifth Circuit disagreed. The exclusion of septic systems from the additional sewage sludge requirements does not necessarily mean they are not a point source. In this case, the BHA septic systems are containers that discharge pollutants due to improper installation. The court held there was sufficient evidence to support a finding that the septic systems were point sources subject to NPDES permitting.

. . . developers should not take the advice or warnings of the EPA, the Corps, or state agencies lightly.

Mail Fraud and Conspiracy

The Defendants also appealed their convictions for mail fraud and conspiracy. A conviction for mail fraud requires: (1) a scheme to defraud; (2) use of the mails to execute that scheme; and (3) the specific intent to defraud.[10] The court concluded that there was clearly a scheme to defraud the buyers. First, the Defendants advertised the lots as "2 Acres – High & Dry land, [with] well, septic & power pole"[11] when the lots were obviously not "high and dry." The Defendants then used the mail to receive payments and send receipts for the fraudulent sales. The government presented sufficient evidence to support a conviction for mail fraud. The Fifth Circuit also upheld the Defendants' convictions for conspiracy.

Conclusion

This case clarifies that developers should not take the advice or warnings of the EPA, the Corps, or state

See CWA, page 13

Flood Insurance Does Not Trump Endangered Species

Fla. Key Deer v. Paulison, 2008 U.S. App. LEXIS 6850 (11th Cir. Apr. 1, 2008).

Stephanie Showalter

The Eleventh Circuit Court of Appeals recently upheld a district court ruling requiring the Federal Emergency Management Agency (FEMA) to comply with the Endangered Species Act (ESA) in its administration of the National Flood Insurance Program (NFIP) in the Florida Keys. This ruling is the latest blow to FEMA in an 18-year-old litigation battle waged by the National Wildlife Federation, the Florida Wildife Federation, and the Defenders of Wildlife (Wildlife Organizations).

Background

It all started in 1984 when FEMA refused to comply with a consultation request from the U.S. Fish and Wildlife Service (FWS) regarding the Florida Key deer and other listed species in the Florida Keys. The ESA provides for the conservation of endangered species and the conservation of the ecosystems on which they depend. Approximately 1,880 species are listed as either endangered or threatened under the ESA, including the Florida Key deer.

Section 7 of the ESA requires federal agencies to undertake programs for the conservation of endangered and threatened species and prohibits the agencies from authorizing, funding, or carrying out any action that would jeopardize a listed species or destroy or modify its critical habitat.[1] Section 7 applies to activities on federal lands, as well as federal approvals of private activities through the issuance of a permit or license. When determining whether an action would jeopardize a listed species, the agency must consult with the FWS.

Formal (written) consultation is required if the agency determines that its action "may affect listed species of critical habitat."[2] Following consultation, the FWS issues a "Biological Opinion" summarizing its findings. If FWS finds that the action will result in jeopardy or adverse modification, it is required to suggest "reasonable and prudent alternatives" which will not violate the ESA.[3] Upon such a finding, the action agency has three alternatives: terminate the action, implement the alternatives, or seek an exemption from the Endangered Species Committee.

Jeopardy

The Wildlife Organizations sued FEMA in 1990 to compel consultation citing the agency's issuance of flood insurance as a cause of overdevelopment that adversely affected the area's endangered species. FEMA eventually entered into formal consultations with the FWS in 1994 after being ordered to do so by a Florida district court. In 1997, the FWS issued a jeopardy determination and recommended several reasonable and prudent alternatives. Among the alternatives was a recommendation that FEMA provide incentives to communities, such as reduced insurance premiums, for the completion of county-wide habitat conservation plans.

In 1999, FEMA modified its community rating system (CRS) program to provide credits for a habitat conservation plan. Through the CRS FEMA provides discounted insurance premiums to communities that go beyond the minimum land use control criteria. A community can receive up to 15 points for adopting and implementing a plan. A community gets 10 points for development and implementation and an additional 5 points if the plan is approved by the FWS or the National Marine Fisheries Service.

When Monroe County failed to prepare a county-wide habitat plan within four years, FEMA and the FWS were required by the terms of the 1997 document to enter into a second consultation. In 2003, the FWS issued a new biological opinion. The FWS again determined that FEMA's administration of the NFIP in the Florida Keys was likely to jeopardize listed species. However, the FWS concluded that the reasonable and prudent alternatives it recommended in 1997 were providing adequate protection.

The Wildlife Organizations disagreed and filed motions in district court to challenge the 2003 findings of the FWS and FEMA's decision to adopt them. In 2005, the district court ruled that neither agency had satisfied its obligations under § 7 and enjoined FEMA from "providing any insurance for new developments in the suitable habitat of listed species in Monroe County pending further consultation."[4] FEMA and the FWS appealed arguing, among other things, that the ESA does not apply to the NFIP and, even if it does apply, the ESA does not require agencies to develop location-specific programs for conservation of listed species.

Applicability of ESA to NFIP

In 2007, the Supreme Court held that § 7(a)(2) "covers only discretionary agency actions and does not attach to actions . . . that an agency is required by statute to undertake once certain specified triggering events have occurred."[5] FEMA claimed it does not have enough discretion under the National Flood Insurance Act to trigger § 7(a)(2).

The Eleventh Circuit disagreed. FEMA is required to provide flood insurance to communities with adequate land use and control measures "which are consistent with the comprehensive criteria for land management and use developed" by FEMA.[6] In addition to guiding development away from flood-prone areas and helping to reduce damage, the criteria should be designed to "otherwise improve the long-range land management and use of flood-prone areas."[7] The court concluded that this phrase provides FEMA with broad discretion to develop criteria under which flood insurance may be issued. Further, FEMA's own actions reveal that it has broad discretion in implementing the CRS. The court was "satisfied that FEMA has discretion to consider endangered and threatened species in its administration of the NFIP."[8]

Nor was the court persuaded by FEMA's arguments that flood insurance was not a "legal cause" of the development in the Florida Keys. Section 7(a)(2) applies to "any action authorized, funded, or carried out" by a federal agency. Agencies must consider the effects of the action as a whole, including direct and indirect effects. "Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur."[9] The court concluded that since FEMA "has the authority to prevent the indirect effects of its issuance of flood insurance by, for example, tailoring the eligibility criteria that it develops to prevent jeopardy to listed species . . . its administration of the NFIP is a relevant cause of jeopardy to listed species."[10]

Location-Specific Plans

Although the CRS program and the habitat conservation plan credits are nationally available, the court found no evidence that any community has applied for or received credit for a habitat conservation plan. The district court held that the implementation of a voluntary program with no effect on the Key deer and the other listed species was insufficient to meet FEMA's obligation to conserve species. The Eleventh Circuit agreed. While federal agencies have discretion in selecting the type of conservation program to implement under the ESA, "they must in fact carry out a program to conserve."[11] Since no community has developed or adopted a habitat conservation plan

Photograph of a Florida Key deer courtesy of USFWS, photographer Phil Frank.

See Endangered Species, page 13

Richton Salt Dome, from page 1

This limited the DOE to considering the previous five candidate sites in Texas, Louisiana, and Mississippi and any others suggested by the governors of those states. On February 14, 2007, the DOE announced that it would create the new storage facility in Richton, Mississippi with a capacity of 160 million barrels and expand the existing sites in Big Hill and Bayou Choctaw. Richton was chosen "for its large and undeveloped salt dome, enhanced oil distribution capabilities, and inland location that is less vulnerable to the damaging effects of hurricanes."[5]

Photograph of the Josephine Bar near the Richton Salt dome courtesy of Ronnie Blackwell (http://ronnieblackwell.com/Wordpress/).

Creating a SPR

To store the petroleum reserves, the DOE carves caverns out of underground salt domes through a process known as "solution mining." Massive amounts of freshwater are injected into the salt domes to dissolve the salt. The resulting brine is pumped out and injected underground or discharged into the Gulf of Mexico.

In its final environmental impact statement, the DOE estimated that it would need to withdraw 46 million gallons of water a day from the Leaf River to hollow out the salt cavern in Richton.[6] During times of low flow, supplemental water would be drawn from the Gulf of Mexico. During the second round of environmental assessments, the DOE is considering the Pascagoula River as an alternative site for the water intake pipe.

Withdrawing 50 million gallons of water a day from either the Leaf River or the Pascagoula River would have significant impacts on aquatic life. Some fish, for instance, may not be able to survive in such chronic low-flow conditions. The Gulf sturgeon, a species listed as threatened under the federal Endangered Species Act, is just one of many species which would be adversely affected by the project. Discharging the brine into the Gulf of Mexico will greatly increase the salinity near the discharge pipe potentially affecting sea life in the area. In addition, over 1,500 acres of wetlands could be affected by the construction phases of the project.

Conclusion

A lot of voices hope to be heard during the public comment period for the supplemental environmental impact statement. The Mississippi Department of Marine Resources (DMR) has recommended that DOE use salty water from the Gulf of Mexico, rather than fresh water, to hollow out the salt dome at the site.[7] The Gulf Conservation Coalition, an environmental group formed to address threats posed by the project, argues that freshwater should be withdrawn from the Mississippi River and the brine injected underground.[8] A Mississippi House committee recently drafted a resolution asking that water be withdrawn from the Gulf of Mexico rather than from the Pascagoula River system because of the potentially damaging effects on the Pascagoula River.[9] Additionally, a board of supervisors in a

See Richton Salt Dome, page 12

Fifth Circuit Affirms Dismissal of *Qui Tam* Action

U.S. ex. Rel. Marcy v. Rowan Companies, 2008 WL 588745 (5th Cir. Mar. 5, 2008).

Stephanie Showalter

In March, the Fifth Circuit Court of Appeals affirmed the dismissal of an offshore oil worker's *qui tam*[1] action against his employers, an oil and gas leesee, an oil and gas company, and a contractor who provided drilling services. Robert Marcy claimed that while employed on the Midland offshore drilling unit in the Gulf of Mexico he was ordered by his employers to illegally dump oil, oil waste, solid waste, grease, paint, and other hazardous substances into the Gulf at night. Marcy further claimed that his employers intentionally failed to report the discharges as required by law. Marcy contends that his employers' conduct constituted a violation of the federal False Claims Act (FCA).

The FCA was passed to "provide for restitution to the government of money taken from it by fraud."[2] The act permits private individuals, under certain circumstances, to pursue a claim on behalf of the federal government against any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government."[3] A claim may also be pursued against someone who "knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."[4] The FCA provides incentives for witnesses of fraudulent activity to file suit – plaintiffs are entitled to a portion of the final judgment awarded by a court. "The potential financial recovery available to *qui tam* plaintiffs is between 15 and 25 [percent] of the action if the government participates, plus reasonable expenses and attorney's fees."[5] If the government does not participate, the *qui tam* plaintiff could recover between 25 to 30 percent.[6]

The Fifth Circuit agreed with the U.S. District Court for the Eastern District of Louisiana that Marcy had failed to state a valid claim under the FCA. Marcy argued that his employers "fraudulently maintained their right to take government property under the lease by failing to report their violations of certain laws and regulations."[7] The court found two problems with this argument. First, the employers did not request money or property from the federal government. They were taking federal property, oil, through the terms of a valid oil and gas lease. Second, any false claim made regarding compliance with the terms of the lease (i.e. omission of discharges from reports) was not material. "A material claim is one that is required to be made in order to receive the relevant government benefit."[8] Marcy's employers did not need to make a false certification of environmental compliance to continue extracting oil. While the government has the option to cancel a lease upon the failure of a lessee to comply with the terms, it does not have to.

Qui tam is an abbreviation of a Latin phrase meaning "Who sues on behalf of the King as well as himself."

Marcy's reverse FCA argument based on 31 U.S.C. § 3729(a)(7) also failed to state a claim. "In a reverse [FCA] suit, there is no improper payment by the government to a defendant, but rather there is an improper reduction in the defendant's liability to the government."[9] Marcy argued that by falsely certifying compliance with the terms of the lease, his employers avoided fines and other penalties that would have been imposed under environmental laws. The court disagreed noting that a reverse claim does not extend to "potential or contingent obligations" to pay fines

See Qui Tam, page 12

District Court Dismisses Mississippi's Groundwater Claim

Hood v. City of Memphis, Tenn., 533 F. Supp.2d 646 (N.D. Miss. 2008).

Surya Gunasekara, M.R.L.S., 1L, University of Mississippi School of Law

Mississippi recently sued the City of Memphis and their municipal utility company Memphis Light, Gas and Water Division (MLGW) (collectively "Memphis") for wrongfully appropriated groundwater from an interstate aquifer. The Northern District Court of Mississippi dismissed the action without prejudice holding that the State of Tennessee was a necessary and indispensable party to the action. If the state of Mississippi wishes to pursue its claim, it will have to file an original action against Tennessee with the U.S. Supreme Court.

Background

The Memphis Sands Aquifer (the Aquifer) is an underground reservoir that lies beneath parts of Northwestern Mississippi, Western Tennessee, and Eastern Arkansas. The Aquifer consists of a "400-900 foot thick layer of very fine to very coarse sand interlaced with beds of clay and silt."[1] This unique geological configuration results in what is arguably one of the best sources for high quality water in the U.S.

Memphis owns and operates one of the largest artesian water systems which makes it "the largest city in the world that relies solely on groundwater wells for its water supply."[2] Essentially, all of Memphis' water is drawn from the Memphis Sands Aquifer. As Memphis is located near the Mississippi/Tennessee state line, many of the wells operated by MLGW are situated near the border between the two states.

Historically, the Aquifer naturally flowed in a southwesterly direction. Increased pumping by Memphis over the past few decades has reversed this flow and the Aquifer now flows north from Mississippi into Tennessee. Memphis' pumping has also contributed to the development of a cone of depression in the Aquifer centered under Memphis. These two factors allow water, which originally lay under Mississippi soil, to migrate into Tennessee where it can be pumped and put to use by Memphis.

Mississippi alleges that a third of Memphis' water requirements, or 60 million gallons per day, was being pumped by MLGW's wells and wellfields from Mississippi's groundwater.[3] Mississippi argued that this misappropriation of water unjustly enriched Memphis by enabling the city to sell off water belonging exclusively to Mississippi. Mississippi sought injunctive relief from the court for this misappropriation of Mississippi's groundwater. In addition, Mississippi sought damages for: (1) the value, plus interest, of all the water pumped from Mississippi's share of the Aquifer since 1985; and (2) the value of the past and future unjust enrichment or costs avoided by Memphis and MLGW (estimated at several hundred million dollars for each charge).[4]

Indispensable Parties

Memphis claimed the case should be dismissed because the State of Tennessee was an indispensable party. Rule 19(a) of the Federal Rules of Civil Procedure requires a person or entity to be joined as a party to a lawsuit if in the person's absence complete relief cannot be given among those already a party, or the person's absence would impair his ability to protect his interest.[5] If a person is an indispensable party but cannot be joined for some reason (it would deprive the court of jurisdiction, for instance), the court must decide whether the case can proceed or must be dismissed. Courts must consider the following factors: the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment or other measures; whether a judgment rendered in the person's absence would be adequate; and whether the plaintiff would have an adequate remedy if the action were dismissed.[6]

The district court first examined whether joinder was possible under Rule 19(a). Acknowledging that there were no reported cases involving the

apportionment of interstate groundwater or aquifers, the court concluded that the doctrine of equitable apportionment could logically be applied to groundwater. The doctrine has typically been the means of resolving disputes over interstate surface waters. Because the aquifer in dispute had never been apportioned between the states by agreement or by the Supreme Court, the district court would have to engage in *de facto* appropriation and divide the water between Mississippi and Tennessee to determine each state's share. Since Tennessee's absence would impair its ability to protect its interest (water resources), the state must be joined under Rule 19(a). Tennessee's joinder, however, would deprive the district court of jurisdiction. Controversies involving two or more states fall under the original and exclusive jurisdiction of the Supreme Court.

The court therefore turned to Rule 19(b) to determine whether the action should proceed or be dismissed with Tennessee labeled as an indispensable party. Applying the four-part test outlined above, the court found that any ruling would certainly be prejudicial to Tennessee's interests, since the court would be deciding the water rights of each state. The court did not see any way in which protective provisions could be added to the judgment to avoid harm to Tennessee. Finally, the court concluded that a judgment rendered without the presence of Tennessee would simply not be adequate.

Conclusion

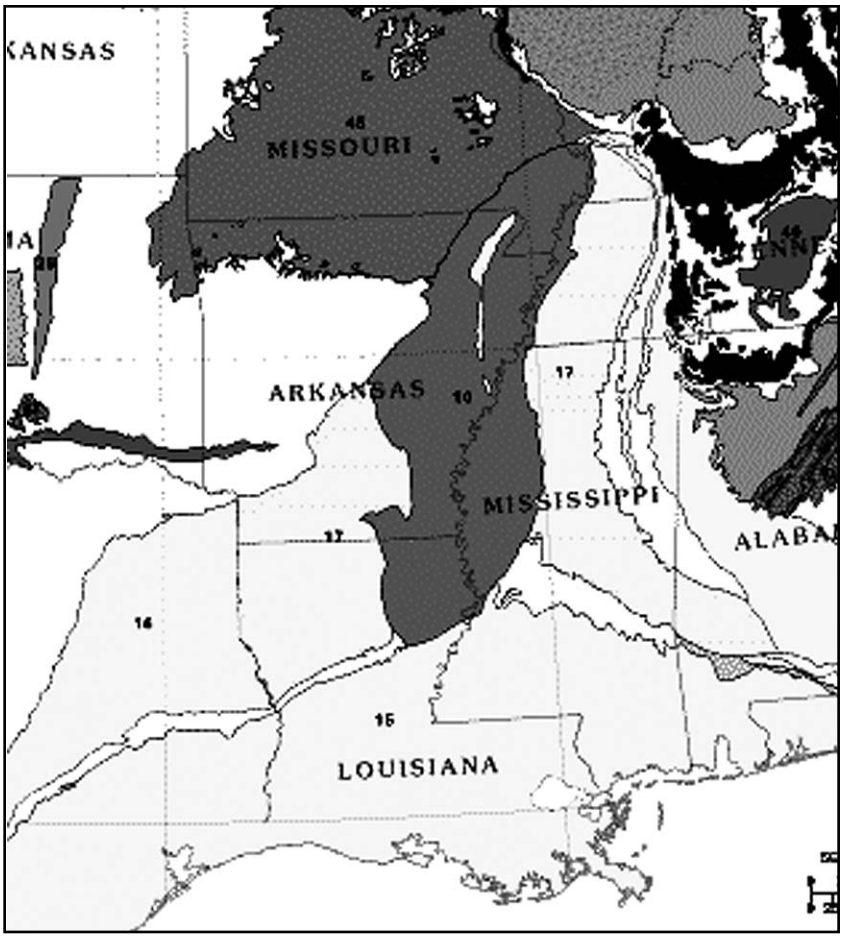
The Northern District Court of Mississippi found that Tennessee was an indispensable party to the action pursuant to Rule 19(b). The court lacked the authority to join Tennessee, however, because controversies between states are under the original and exclusive jurisdiction of the U.S. Supreme Court. The action was accordingly dismissed without prejudice. The court noted that the Aquifer lies beneath Arkansas as well, but made no determination regarding the indispensability of Arkansas to the action. The court recommended that the state Attorney General of Arkansas be made aware of the court's opinion

In awarding costs to the prevailing party the district court ruled that due to the unique procedural developments Mississippi and Memphis would split Memphis' reasonable costs of $50,233.33. Mississippi has since filed a notice of appeal to the Fifth Circuit Court of Appeals.˅

Endnotes

1. Complaint at 4, *Hood v. City of Memphis, Tenn.*, 533 F.Supp.2d 646 (N.D. Miss. 2008).
2. *Id*. at 2.
3. *Id*. at 3.
4. *Id.* at 7-9.
5. Fed. R. Civ. P. 19(a).
6. *Id*. at 19(b).

Rendition of the Memphis Sand Aquifer taken from a larger ground water atlas of the United States, courtesy of the USGS.



Corps v. EPA: The Battle to Preserve the Yazoo Backwater Area

Stephanie Showalter
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The stage is set for a historic showdown between the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) over a flood control project in the Mississippi Delta. On March 19, 2008, the EPA released for public comment its proposed determination to prohibit or restrict the use of certain waters in the Yazoo River Basin as disposal sites for dredged and fill material pursuant to its authority under §404(c) of the Clean Water Act (CWA).[1] The Yazoo Pumps project, first authorized by Congress 67 years ago, may soon be dealt a fatal blow from the most unlikely of sources – the Bush Administration.

Yazoo River Basin

The Yazoo River Basin is located within the Mississippi River Alluvial Plain (MSRAP). Bottomland hardwood forest is the dominant ecosystem, which is maintained by regular backwater and other flood events and localized ponding on poorly drained soils.[2] Backwater flooding occurs when "high water stages on the Mississippi River create a damming effect, preventing tributary drainage into the mainstem and at times reversing tributary flow upstream."[3] Due to differences in the timing, frequency, and duration of flooding, a wide array of habitats are present in the area. The Mississippi Department of Fisheries, Wildlife, and Parks estimates that "over 240 fish species, 45 species of reptiles and amphibians and 37 species of mussels depend on the river and floodplain system of MSRAP."[4] This list includes the pondberry, listed as endangered under the Endangered Species Act (ESA), and the Louisiana black bear, which is listed as threatened under the ESA.

Bottomland hardwood forests in Mississippi are primarily threatened by agricultural conversion and flood control structures. The forests that remain are increasingly fragmented. Only 15 percent of the Mississippi Delta remains forested.[5] The largest segment (100,000 acres) is located within and around the Delta National Forest in the Yazoo Backwater Area.

History of the Yazoo Pumps Project

The Yazoo Backwater Area Project (project) was authorized by the Flood Control Act of 1941. As waters rise on the Mississippi River, it forces the Yazoo River to 'back up' which causes a slow moving flood than can remain above flood stage for several months at a time in the lower Yazoo Basin of Mississippi. The Corps estimates that this backwater flooding impacts 1,300 homes within the 100-year flood plain and 316,000 acres of agricultural land within the 100-year flood plain and costs the agricultural industry $7.7 million annually.[6] The project would reduce backwater flooding in the Yazoo River Basin through a combination of levees, drainage structures and pumping plants. By 1978 the Corps had completed several components of the project, including flood control gates on Steele Bayou and the Little Sunflower River, the Yazoo Backwater Levee, and the Sunflower River to Steele Bayou Connecting Channel.

The construction of the Yazoo Pumps is the final stage of the project. Construction stalled in 1986 with the passage of the Water Resources Development Act (WRDA). Under the Flood Control Act of 1941, the project was to be fully funded by the federal government. WRDA mandated local cost-sharing for any project started after April 30, 1986. The Mississippi Levee Board and the state of Mississippi could not come up with the funds, but were ultimately saved by Senator Thad Cochran in 1996. An amendment in the WRDA reauthorization bill restored full federal funding for the project and work resumed.

The Yazoo Pumps consist of structural and non-structural components. First, the Corps intends to construct a 14,000 cfs (cubic feet per second) pumping station at Steele Bayou to maintain the water level at 87.0 feet. The Corps then plans to reforest up to 40,571 acres of agricultural land through the purchase

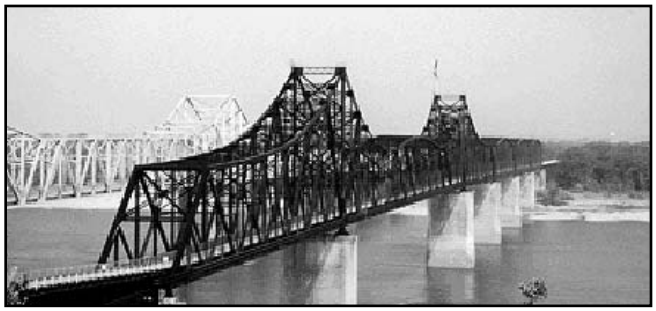
of conservation easements to mitigate the adverse environmental impacts. This price tag for this phase of the project is $220.1 million.

The EPA estimated that the construction and operation of the proposed pumps would "degrade the critical functions and values of approximately 67,000 acres of wetland resources in the Yazoo River Basin."[7] Of those 67,000 acres, approximately 26,300 acres would be modified to such an extent that they would no longer meet the jurisdictional definition of wetland under the CWA. "EPA Region 4 believes these extensive hydrological modifications of wetlands in the Yazoo River Basin could have an unacceptable adverse effect on fisheries and wildlife resources." How's this for a statistic? EPA noted that the Corps' own numbers indicate the adverse impacts from this project are greater than the total impacts associated with the 86,000 projects permitted by the Corps nationwide each year.[8]

EPA believes the Yazoo Pumps will result in significant adverse impact to extensive areas of forested wetlands and the associated fish and wildlife resources. Not only will the reduction of flooding in the Yazoo Backwater Area destroy valuable and increasingly rare habitat, it is likely to encourage the expansion of agriculture into the area further degrading habitat and water quality. The EPA is also concerned that the Corps' proposed mitigation (reforestation of 55,600) is impractical and unlikely to restore lost wetland functions. The Corps' own Final Supplemental Environmental Impact Statement suggests that there may not be enough acres of cleared wetlands with the proper hydrology and soils in the project area to satisfy this goal.[9] In addition, the EPA is not convinced that the Corps has sufficiently considered less environmentally damaging alternatives, such as relocation of flood-prone structures, localized flood protection structures, expansion of insurance programs, and conservation easements.[10]

EPA's Pending Veto

Under the Clean Water Act, Section 404(c), the EPA may prohibit, restrict, or deny the use of any area as a disposal site "whenever [it] determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational



Photograph of Yazoo River Bridge courtesy of the USGS.

areas."[11] The § 404(c) process may be initiated by a Regional Administrator, as the Region 4 administrator did on February 1, 2008. This letter laid the foundation for the first EPA veto of a Corps project since 1990. Step two in the § 404(c) process occurred on March 19, with the publication of the proposed notice. Following the close of the public comment period on May 5, the Regional Administrator may withdraw his proposed determination or prepare a recommended determination. If he chooses to prepare a recommended determination, it will be forwarded to the Assistant Administrator for Water (Headquarters) who will make the final determination.˅

Endnotes

1. EPA, Proposed Determination to Prohibit, Restrict, or Deny the Specification, or the Use for Specification, of an Area as a Disposal Site; Yazoo River Basin, Issaquena County, MS, 73 Fed. Reg. 14,806 (March 19, 2008).
2. Mississippi Comprehensive Wildlife Conservation Strategy 2005 – 2015 at 66 (October 2005), http://www.mdwfp.com/level1/cwcs.asp .
3. *Id.* at 67.
4. *Id.*
5. EPA Proposed Determination, 73 Fed. Reg. at 14,810.
6. U.S. Army Corps of Engineers Vicksburg District, Yazoo Backwater Area Reformulation Study: Project Summary and Recommended Plan, available at: http://www.mvk.usace.army. - mil/offices/pp/projects/ybrsummary/media/Pro - ject_Overview.pdf .
7. EPA Proposed Determination, 73 Fed Reg at 14,812.
8. *Id*
9. *Id.* at 14,817.
10. *Id.* at 14,818.
11. 33 U.S.C. 1344(c).

Richton Salt Dome, from page 6

neighboring county passed a resolution expressing their desire that the DOE take water out of the Mississippi River or the Gulf of Mexico.[10]

It is safe to assume, given the Congressional mandate to expand the SPR and the amount of planning already invested by the DOE, that Richton, Mississippi will be the site of a new petroleum reserve. Hopefully, during the second round of environmental assessments, the DOE will take the concerns of the residents of the Gulf Coast to heart and redesign the project to have less environmental impacts.˘

Endnotes

1. Department of Energy, Strategic Petroleum Reserve – Profile, http://fossil.energy.gov/programs/reserves/spr/index.html .
2. *Id.*
3. Department of Energy, Final Environmental Impact Statement for Site Selection for the Expansion of the Nation's Strategic Petroleum Reserve, S-1 (December 2006) available at http://fossil.energy.gov/programs/reserves/publications/Pubs-SPR/2006_SPR_EIS.html .
4. Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 684 (Aug. 8, 2005).
5. Department of Energy, Supplemental Environmental Impact Statement: Site Selection for the Expansion of the Strategic Petroleum Reserve, 73 Fed. Reg. 11,895 (Mar. 5, 2008).
6. FEIS, *supra* note 3, at S-40.
7. Newsom, Michael, DMR has Alternate Idea for Salt Dome, *Biloxi-SunHerald*, Feb. 14, 2008.
8. *Id.*
9. Newsom, Michael, Resolution Seeks Salt Dome Revision, *Biloxi-SunHerald*, Mar. 20, 2008.
10. Roley, Veto F., George County Supervisors Oppose Salt Dome Plan, *The Mississippi Press*, Mar. 7, 2008.

Qui Tam, from page 7

which have not be levied and "which do not arise out of an economic relationship between the government and the defendant."[10] The obligation to pay asserted by Marcy was mere speculation, as the government has discretion regarding the imposition of penalty for violations of environmental laws. Furthermore, the employers' potential liabilities would have arisen out of the environmental laws, not the oil lease with the federal government. Marcy's allegation of false certification to avoid possible environmental liability is insufficient to sustain a reverse false claim.˘

Endnotes

1. *Qui tam* is an abbreviation of a Latin phrase meaning "Who sues on behalf of the King as well as himself." Black's Law Dictionary, 1251 (6th ed. 1990).
2. *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 551(1943).
3. 31 U.S.C. § 3729(a)(2).
4. *Id.* 3729(a)(7).
5. Christi L. Underwood, *False Claims Act*, Practicing Law Institute Handbook: Handling Construction Risks 2007: Allocate Now or Litigate Later (Mar. 2007).
6. *Id.*
7. *U.S. ex. Rel. Marcy v. Rowan Companies*, 2008 WL 588745 at *3 (5th Cir. Mar. 5, 2008).
8. *Id.* at *3.
9. *Id.* at *4.
10. *Id.* at *5, citing *U.S. ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 657 (5th Cir. 2004).

Photograph of oil platform courtesy of the Gulf of Mexico Minerals Management Service.

Endangered Species, from page 5

since the CRS was amended, "the program has had no effect whatsoever . . . and it is therefore not a program to conserve."[12]

Conclusion

The Eleventh Circuit upheld the district court's injunction. FEMA is currently prohibited from issuing flood insurance for new developments in the suitable habitats of the listed species in Monroe County pending further consultation and development of adequate criteria.

Although the Eleventh Circuit's ruling only applies to the issuance of flood insurance in one Florida county, it could have ripple effects across the country. There are many endangered and threatened species that depend on Gulf Coast habitats, including the Alabama beach mouse and pitcher-plants. Communities eligible for flood insurance should take proactive steps to ward off similar litigation. First, communities should investigate whether there are endangered or threatened species in their areas. If there are, communities should develop habitat conservation plans and apply for credit through the CRS.˅

Photograph of pitcher plant courtesy of United States Botanic Garden.

Endnotes

1. 16 U.S.C. § 1536(a).
2. 50 C.F.R. § 402.14(a).
3. 16 U.S.C. § 1536(b)(3)(A).
4. *Fla. Key Deer v. Brown*, 386 F. Supp. 2d 1281, 1294 (S.D. Fla. 2005).
5. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007).
6. 42 U.S.C. § 4012(c).
7. *Id.* § 4102(c).
8. *Fla. Key Deer v. Paulison*, 2008 U.S. App. LEXIS 6850 at *21 (11th Cir. Apr. 1, 2008).
9. 50 C.F.R. § 402.02.
10. *Fla. Key Deer*, 2008 U.S. App. LEXIS 6850 at *25.
11. *Id.* at *34.
12. *Id.* at *35.

CWA, from page 3

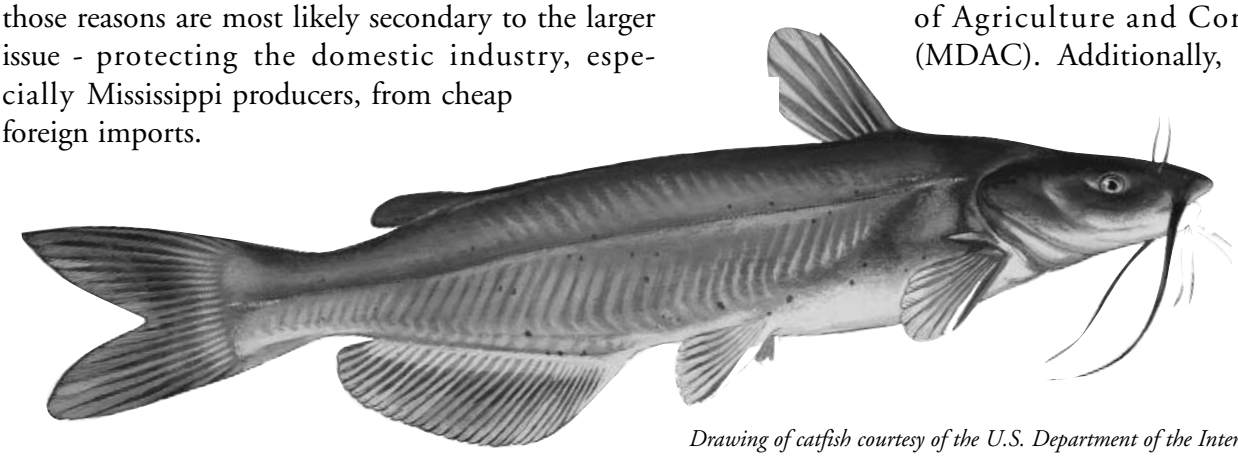
agencies lightly. Felony convictions do sometimes result from violation of federal and state environmental laws, especially when there is also evidence of other criminal activity such as fraud.˅

Endnotes

1. See, *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1995).
2. 547 U.S. 715 (2006).
3. *Id.* at 742.
4. *Id.* at 759.
5. *Id.* at 780.
6. *United States v. Lucas*, 516 F.3d 316, 326 (5th Cir. 2008).
7. 40 C.F.R. § 122.2.
8. *Id.* § 122.1(b)(2).
9. *Id.* § 122.2.
10. *Lucas*, 516 F.3d at 339.
11. Josh Clemons, *Trio Convicted in Big Hill Acres Case: Long-Suffering Residents See Justice Done*, WATER LOG 25:1 at 6 (May 2005).

Mississippi Requires Disclosure of Catfish's Country of Origin

On April 8, 2008, Governor Haley Barbour signed Mississippi House Bill 728 into law. Effective July 1, 2008, all retailers of catfish products in Mississippi will be required to clearly and visibly inform customers, at the final point of sale, of the origin of the catfish. According to the legislative findings, the disclosure law was spurred by concern over the use by foreign producers of antibiotics and chemicals not approved for use in the U.S. and seafood fraud (the misrepresentation of less expensive aquaculture products as pricier products). While that is probably true, those reasons are most likely secondary to the larger issue - protecting the domestic industry, especially Mississippi producers, from cheap foreign imports.



Drawing of catfish courtesy of the U.S. Department of the Interior.

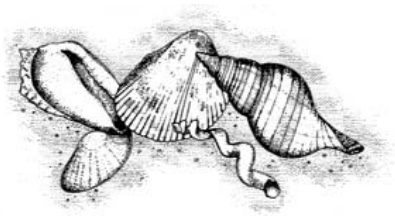
A retailer is defined as "any person offering for sale catfish products to individual consumers and representing the last sale prior to human consumption and includes food service establishments." A retailer may designate farm-raised catfish as having a U.S. country of origin only if it is "hatched, raised, harvested, and processed in the United States." Catfish harvested in the waters of the United States and processed in the U.S. may also be labeled as having a U.S. country of origin. The notices must distinguish between farm-raised and river or lake catfish. The country of origin information may be provided to consumers by means of a "label, stamp, mark, placard, or other clear and visible sign on the catfish or on the package, display, holding unit or bin containing the catfish at its final point of sale." To assist with compliance, distributors and wholesalers are required to provide country of origin information to the retailers.

Food service establishments, which include restaurants, cafeterias, food stands, and bars, must provide notice of country of origin on the menu. "For foreign or imported catfish, the information shall be adjacent to the item on the menu and printed in the same font style and size as the item." If the establishment only sells domestic catfish, this information may be generally disclosed in a prominent location in lieu of disclosure on the menu. Any signage used to generally disclose this information must be approved by the Mississippi Department of Agriculture and Commerce (MDAC). Additionally, any advertisement of a catfish product must specify the origin of the catfish.

Upon discovery of a violation, MDAC shall notify the retailer in writing and give the retailer or food service establishment three days to correct the violation. If the violation is corrected during this window, no penalties shall apply. For a first offense, the retailer shall be punished by a fine of not more than $1,000. For a second offense, the fine is increased to $2,000. For subsequent violations, the retailer is subject to a $5,000 fine or the revocation of the retail or food establishment's license. The license may be revoked indefinitely or until the violation is corrected.

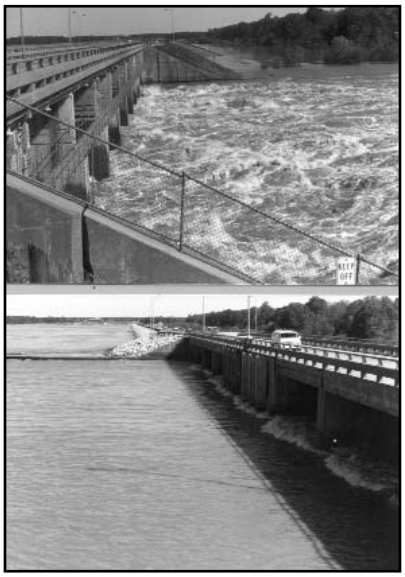
At press time, the text of the bill was available at http://billstatus.ls.state.ms.us/2008/pdf/history/HB/HB0728.xml . Copies may be obtained upon request from the Mississippi-Alabama Sea Grant Legal Program at sealaw@olemiss.edu .

Interesting Items



Around the Gulf…

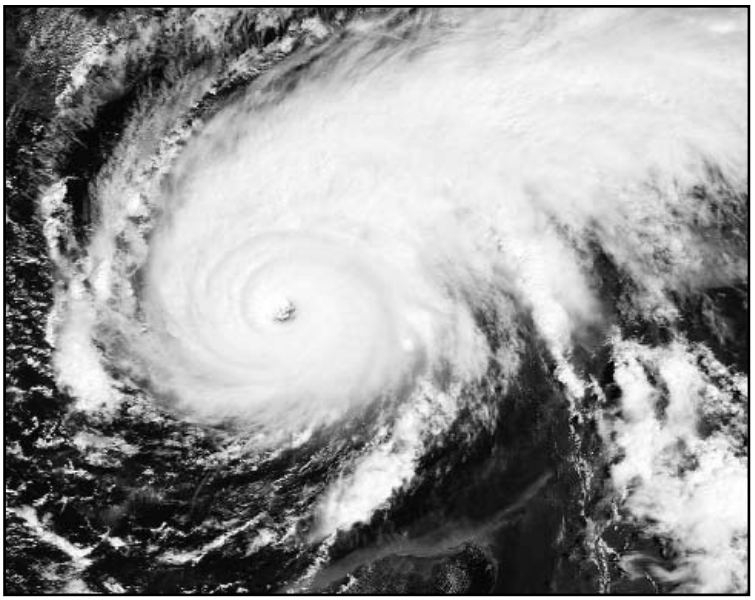
Mississippi's Pearl River was recently named one of America's Most Endangered Rivers by the nonprofit organization, American Rivers. Flowing through Jackson, Mississippi, the Pearl River is 490 miles long and its watershed covers 8,760 acres. According to American Rivers, the largest threat to the Pearl is irresponsible floodplain development. Currently a group of developers is seeking permission to dam and dredge the Pearl River near Jackson to create one to two lakes and up to twenty-five islands for private commercial development. Some early estimates suggest that the project could impact as many as 5,500 acres of wetlands and 3,400 acres of bottomland hardwood forest. Such massive alterations would cause significant harm to wildlife, impair water quality, and increase downstream flooding. The Corps of Engineers received $205 million from Congress for this project in the Water Resources Development Act of 2007, although the agency is not required to construct it.



Photograph of Pearl River at Ross Barnett Spillway near Jackson, MS during April 1979 Flood courtesy of USGS.

On April 21, 2008, U.S. District Judge L.T. Senter Jr. dismissed a couple's fraud claims against State Farm in a Hurricane Katrina lawsuit. Thomas and Pamela McIntosh sued State Farm after the company determined that most of the damage to the home was caused by the storm surge (flood) and thereby excluded from coverage. The fraud claims were based on allegations that State Farm produced two different engineering reports on the McIntosh property, one of which deliberately underestimated the amount of wind damage. Senter ruled that the allegations, if true, would support a finding of bad faith, but are not sufficient to support a finding a fraud.

Photograph of Hurricane Katrina courtesy of NOAA.



In another Hurricane Katrina case, the Fifth Circuit Court of Appeals vacated a Mississippi couple's punitive damage award and ordered a new trial in the couple's case against State Farm. A jury in Gulfport, Mississippi had awarded Norman and Genevieve Broussard $2.5 million in punitive damages. The trial judge later reduced the award to $1 million. The Fifth Circuit vacated the entire award ruling that the jury should not have considered punitive damages in the case.˅

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