

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

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FCC Must Analyze Environmental Impacts of Communication Towers

Amer. Bird Conservancy v. Federal Communications Comm., 516 F.3d 1027 (D.C. Cir. 2008).

Stephanie Showalter, J.D./M.S.E.L.

It was a dark and snowy night. A dense fog settled around three small communication towers decreasing visibility and blurring the safety lights. A large flock of Lapland longspurs, small, sparrow-like, migratory songbirds, took flight. By morning, 10,000 longspurs lay dead beneath the towers and in the surrounding fields.

A scene from a Hollywood horror movie? Unfortunately, no. This mass-kill of migratory songbirds happened on January 22, 1998 as a result of a 420-foot guyed communication tower in southwestern Kansas.¹ After taking flight during a heavy snowstorm, the birds became disoriented and for some reason (most likely having to do with the tower lighting) began circling the communication tower. The birds died due to collisions with the towers, guy wires, or each other and pure exhaustion.

This phenomenon is known as “tower kill.” Ornithologists estimate that in the 1970s, 1.2 million migratory birds were killed annually by collisions with communication towers.² Today, the U.S. Fish and Wildlife Service (FWS) estimates that the number of migratory birds killed by communications towers (cell, television, wireless data, emergency broadcast) could range from 4 to 50 million per year.³ As the number of communication towers rapidly increased as the demand for cell phones and wireless access soared, ornithologists and birders began sounding the alarm about the potential impact of towers on migratory bird populations.

Not much is known about the causes of tower kill. Researchers do know that lighting plays a key role.⁴ Federal Aviation Administration regulations require communication towers over 199-feet, near airports, or along major highways to be lit so pilots can see them at night. Many towers are lit with steady red lights. Researchers also know that the higher the towers, the greater the risk of bird kills.⁵ Seventy-five percent of neotropical songbirds migrate at an altitude between 500 and 6,000 feet.⁶ The number of guy wires also increases with tower height. This relationship between height and mortality is particularly alarming considering the federally mandated conversion to digital televi-

Communication Towers from page 1

sion may have lead television stations to construct as many as 1,000 new, 1,000-foot “megatowers.”⁷

Procedural History

Communication towers are regulated by the Federal Communications Commission (FCC).⁸ In 2002, the American Bird Conservancy (ABC) and other environmental groups, concerned about the effect of tower kill on migratory birds in the Gulf Coast region, formally requested that the FCC analyze the impacts by, among other things, preparing an environmental impact statement and initiating consultation with the FWS as required by the Endangered Species Act (ESA).⁹ While ABC’s petition was pending, the FCC issued a Notice of Inquiry on August 20, 2003 to gather information on the impact of communication towers on migratory birds. The more than 250 comments submitted to FCC revealed the divergent views of the environmental community and the communication industry on the impact of towers.¹⁰ In April 2005, the FCC dismissed the ABC’s petition, but stated that it would address the issue on a nationwide basis. ABC sought review of this order with the U.S. Court of Appeals for the District of Columbia Circuit.¹¹

In November 2006, the FCC issued a notice of proposed rulemaking (NPRM) seeking “comment on the extent of any effect of communications towers on migratory birds and whether any such effect warrants regulations specifically designed to protect migratory birds.”¹² Although the comment period for this rulemaking closed in May 2007, the FCC has not taken final action. On February 19, 2008, the D.C. Circuit Court of Appeals vacated the FCC order denying ABC’s petition for review.

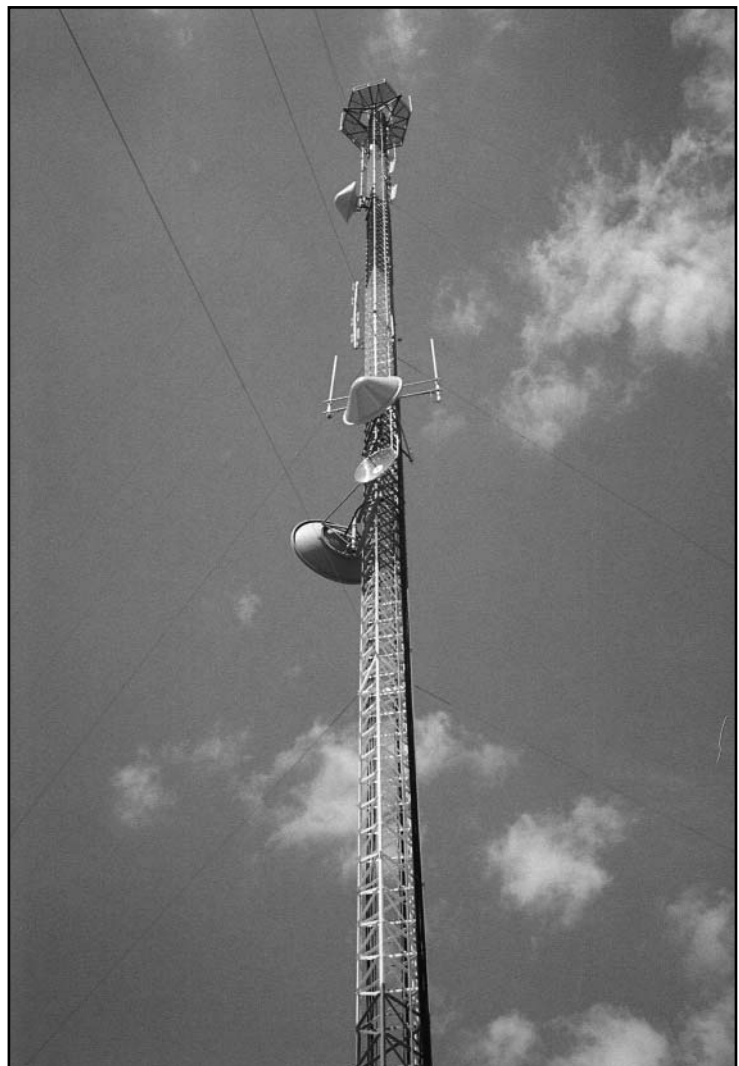
NEPA

The National Environmental Policy Act (NEPA) requires that federal agencies consider the environmental impacts of their decisions. For “major Federal actions significantly affecting the quality of the human environment,” agencies must prepare environmental impact statements (EIS) in which the adverse affects and potential alternatives are ana-

lyzed.¹³ Despite the evidence that communication towers kill millions of birds each year, the FCC has undertaken no comprehensive environmental review of its licensing program.

Individual federal licensing decisions are subject to NEPA as well, but the FCC has excluded communication towers from environmental review because towers “are deemed individually and cumulatively to have no significant effect on the quality of the human environment.”¹⁴ Interested parties, however, are permitted to file a petition alleging that a particular action, otherwise categorically excluded, will have a significant environment effect.¹⁵ If after considering the environmental concerns raised in the petition, the FCC determines the action may have a significant impact, the applicant for a tower license is required to prepare an environmental assessment (EA).¹⁶

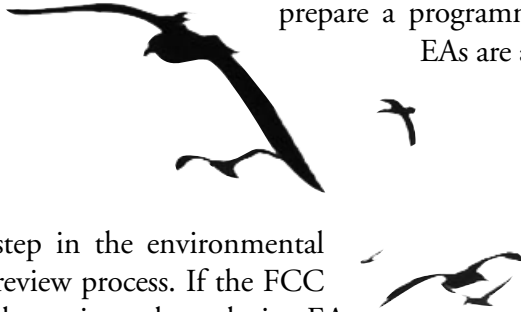
Photograph of communications tower courtesy of the National Science Foundation.



The D.C. Circuit held that the FCC's order denying ABC's petition violated the agency's own NEPA regulations. According to the court, "there is no real dispute that towers 'may' have a significant environmental impact." The § 1.1307(c) threshold, therefore, has been met and the FCC must, at a minimum, prepare an EA. The preparation of an EA does

not necessary mean the FCC must prepare a programmatic EIS.

EAs are an interim



step in the environmental review process. If the FCC determines through its EA that there will be no significant impact on the environment, the agency may issue a Finding of No Significant Impact (FONSI) and avoid an EIS. On the other hand, if the EA indicates that significant impact would result, the FCC must prepared an EIS.¹⁷

ESA

ABC also requested that the FCC consult with the U.S. Fish and Wildlife Service (FWS) regarding the cumulative effect of communication towers on protected species. Section 7 of the Endangered Species Act requires federal agencies to ensure that any action they authorize, fund, or carry out is not likely to "jeopardize the continued existence of any endangered or threatened species."¹⁸ If an action is likely to jeopardize a listed species, the federal agency must consult with the FWS.

The Commission refused to consult with the FWS citing a lack of evidence of synergies among towers that "would cause them cumulatively to have significant environmental impacts that they do not have individually."¹⁹ The court found this explanation inadequate because the FCC did not describe what kind of showing could demonstrate sufficient environmental effects to justify consultation.

Conclusion

The D.C. Circuit vacated the FCC's order and remanded the case to the FCC to comply with NEPA and ESA. The D.C. Circuit anticipated that the results of the pending FCC NPRM are likely to

inform the FCC's decision on remand, but stressed that the nationwide proceeding did not incorporate or supplant the ABC's petition.²⁰ The FCC must still resolve the NEPA and ESA issues raised in ABC's petition.✓

Endnotes

1. Joanne M. Lopez, *The Impact of Communication Towers on Neotropical Songbird Populations*, ENDANGERED SPECIES UPDATE 18(2): 52 (2001).
2. *Id.* at 50.
3. Federal Communications Commission, Proposed Rule, Effect of Communication Towers on Migratory Birds, 71 Fed. Reg. 67510, 67511 (Nov. 22, 2006).
4. Williams R. Evans, et al., *Response of night-migrating songbirds in cloud to colored and flashing light*, NORTH AMERICAN BIRDS, 60: 476-488 (2007).
5. Manville, A. M. II, *The ABCs of avoiding bird collisions at communication towers: the next steps*, in Proceedings of the Avian Interactions Workshop (2000) available at <http://www.fws.gov/migratorybirds/issues/towers/abcs.html>.
6. Lopez, *supra* note 1, at 50.
7. *Curbing Tower Kill*, SCIENCE 291: 2081 (March 2001).
8. The transmission of communications or signals by radio requires a license from the FCC. 47 U.S.C. § 301.
9. *Amer. Bird Conservancy v. FCC*, 516 F.3d 1027, 1029 (D.C. Cir. 2008).
10. *Id.* at 1030.
11. 47 U.S.C. § 402.
12. FCC Proposed Rule, *supra* note 3.
13. 42 U.S.C. § 4332(2)(C).
14. 47 C.F.R. § 1.1306(a). Agencies are permitted under NEPA to establish "categorical exclusions" for activities which do not have a significant effect on the human environment. 40 C.F.R. § 1508.4
15. 47 C.F.R. § 1.1307(c).
16. *Id.*
17. *Id.* § 1.1308(d).
18. 16 U.S.C. § 1536(a)(2).
19. *ABC*, 516 F.3d at 1034-35.
20. *Id.* at 1035.

“Breezes of Paradise” Stirs Up Controversy

Terra Bowling, J.D.

In Hancock County, Mississippi, plans to construct a “condo city” on Gulf Coast wetlands have caused considerable controversy. Plans for the \$750 million dollar project, known as “Breezes of Paradise Bay,” include four high rise condominium towers that would accommodate shops, arcades, restaurants, and residences. The development would sharply contrast with the two small incorporated cities in the county, Bay St. Louis and Waveland, and residents have questioned the wetland fill and the impact of the development on their communities.

In 2002, developers received a permit from the U.S. Army Corps of Engineers to fill the wetlands at issue for the purposes of expanding Bayou Caddy Fisheries, a seafood business. However, the developers did not immediately move to fill the wetlands.

In May 2005, the Hancock County Board of Supervisors rezoned approximately 1,000 acres of coastal wetlands (including the proposed Bayou Caddy Fisheries development) to permit commercial development surrounding the Bayou Caddy Casino.¹

Subsequently, plans to expand Bayou Caddy Fisheries were replaced with plans to build the “Breezes of Paradise Bay.” In 2006, approximately 2.3 acres of wetlands at the project site were filled. The Corps, recognizing the out-of-compliance fill, required the developer to file an after-the-fact permit. The developer filed a permit application requesting to retain fill material in 1.2 acres of wetlands and restore the remaining 1.1 acres of wetlands for the purposes of the condominium construction.² The public comment period has closed and the permit application is pending with the Corps of Engineers.

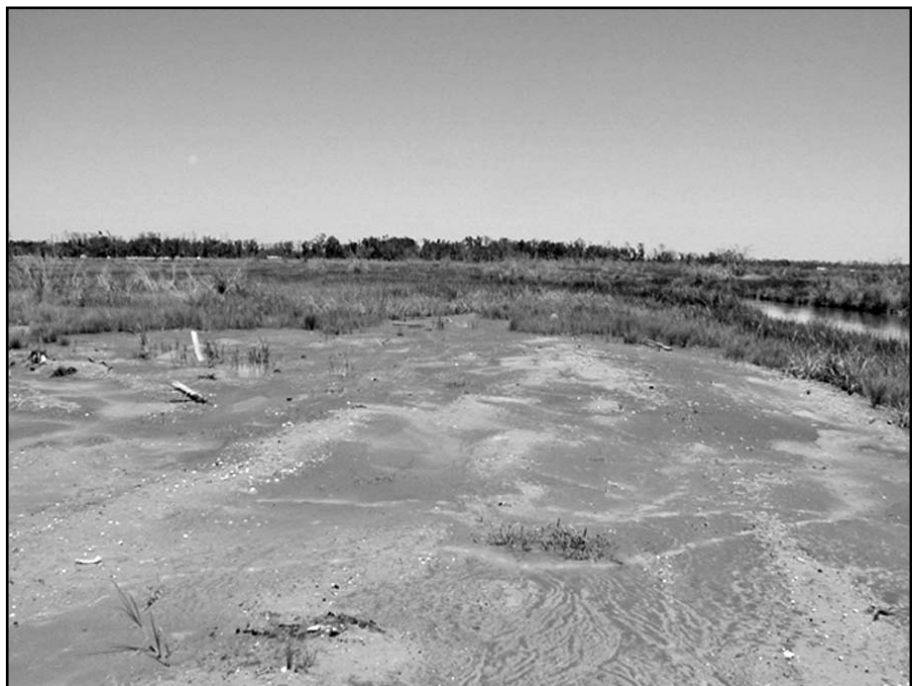
Meanwhile, in November 2007, the Mississippi Court of Appeals reversed Hancock

County’s coastal zoning decision, finding that the Board failed to meet its burden of proof that there was a substantial change in the character of the area to justify the rezoning.³ The ruling would limit the scale of “Breezes of Paradise Bay,” and, in fact, the county’s planning board recently indicated that structures higher than 12 stories would not be allowed at Bayou Caddy.^{4*}

Endnotes

1. The “commercial resort” designation would have allowed large-scale development, without height or density requirements.
2. A copy of the permit is available at <http://www.sam.usace.army.mil/RD/reg/PN/December/SAM-2000-2528-ALF.pdf>.
3. For a full discussion of the case, see Sarah Spigener, *Mississippi Court of Appeals Reverses Coastal Zoning Decision*, WATER LOG 27:4 (Feb. 2008).
4. Patrick Jonsson, *Why a Gulf Wetlands May Become a City*, Christian Science Monitor, May 21, 2008.

Photograph of Sediment from fill running off into adjacent marsh at Bayou Caddy courtesy of Ellis Anderson.



Vessel Monitoring System Lawsuit Allowed to Move Forward

Gulf Fishermen's Association v. Gutierrez, 2008 U.S. App. LEXIS 12559 (11th Cir. June 13, 2008).

Stephanie Showalter, J.D./M.S.E.L.

On December 15, 2006, the Gulf Fishermen's Association (GFA), a commercial fishing advocacy group based in Florida, filed a complaint challenging Amendment 18A to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico. Amendment 18A, among many other things, requires a National Marine Fisheries Service-approved "vessel monitoring system [VMS] on board vessels with Federal commercial permits for Gulf reef fish, including charter vessels/headboats with such commercial permits."¹ GFA claims the final rule implementing Amendment 18A violates the Regulatory Flexibility Act, the Magnuson-Stevens Fisheries Management Act (Act) and the right to privacy guaranteed by the Fourth Amendment.²

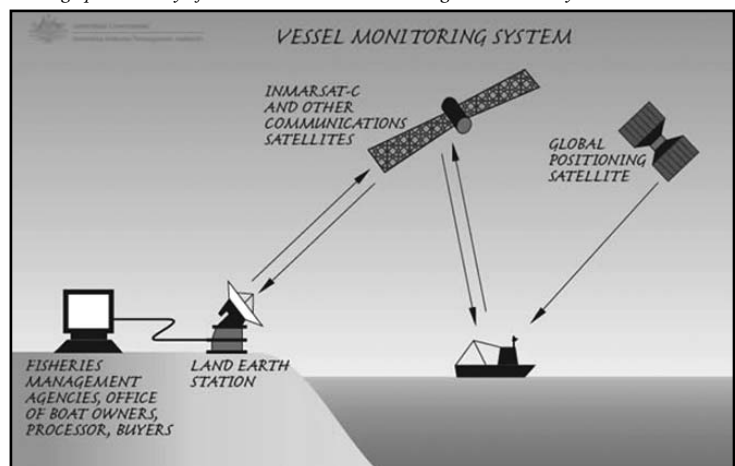
The district court dismissed GFA's suit as time-barred. Regulations promulgated by the Secretary of Commerce (Secretary) under the Act and actions taken by the Secretary under such regulations are subject to judicial review "if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register."³ The Secretary published the final rule implementing Amendment 18A on August 9, 2006. The regulation was to become effective on December 7, 2006. On December 6, the Secretary published a notice delaying the effective date for implementation of the VMS requirement until March 7, 2007. GFA filed its challenge to Amendment 18A nine days later on December 15, 2006. Because GFA was challenging the VMS requirement and not the delay of the effective date, the district court held that GFA should have filed its claim within thirty days of the publication of the final rule on August 9, 2006.

GFA appealed to the Eleventh Circuit. GFA argued that its complaint was timely because the Secretary's notice delaying the effective date created a new 30-day filing window. The Eleventh Circuit agreed. "If a petition for review of a regulation that implements a fishery management plan is filed within thirty days of a Secretarial action under that regulation, it is timely."⁴ Under § 1855(f), according to the court, both regulations and actions are reviewable in a timely-filed petition and a petition is timely if it is filed within thirty days of either the promulgation of the regulation *or* publication of action. GFA's complaint was timely because it was filed within 30 days of a Secretarial action under the regulations implementing Amendment 18A. The case was remanded to the district court for further proceedings. GFA's challenge to the VMS remains alive.⁵

Endnotes

1. National Marine Fisheries Service, Availability of Amendment 18A to the reef fish resources of the Gulf of Mexico; Request for Comments, 71 Fed. Reg. 24635, 24636 (April 26, 2006).
2. *Gulf Fishermen's Association v. Gutierrez*, 484 F. Supp. 2d 1264, 1266 (M.D. Fla. 2007).
3. 16 U.S.C. § 1855(f)(1).
4. *Gulf Fishermen's Association v. Gutierrez*, 2008 U.S. App. LEXIS 12559 at *5 (11th Cir. June 13, 2008).

VMS graphic courtesy of the Australian Fisheries Management Authority.



Trial Court Disallows Proposal to Construct Luxury Resort and Conference Center on Alabama Coast

Gulf Beach Hotel, Inc., v. Gulf State Park Authority, et al., and Charley Grimsley v. Governor Bob Riley, et al., Civil Action Nos. 2005-1409 and 2005-1804 (consolidated) (Circuit Court of Montgomery County, AL).

Timothy M. Mulvaney, J.D.

The Circuit Court of Montgomery County, Alabama, recently halted development plans to construct a luxury hotel, spa, and conference center at Gulf State Park along Pleasure Island's Gulf shore in Baldwin County, Alabama. In an order dated June 26, 2008, Circuit Judge Eugene W. Reese declared a lease agreement, approved by Governor Bob Riley, between the Alabama Department of Conservation and Natural Resources (DCNR) and Auburn University contrary to Alabama constitutional and statutory law.

Background

Gulf State Park, comprising over 6,150 acres and two miles of mostly undeveloped white sand beaches, is the lone natural public space along a coastal area lined with hotels and condominiums. The park provides public recreational opportunities for fishing,

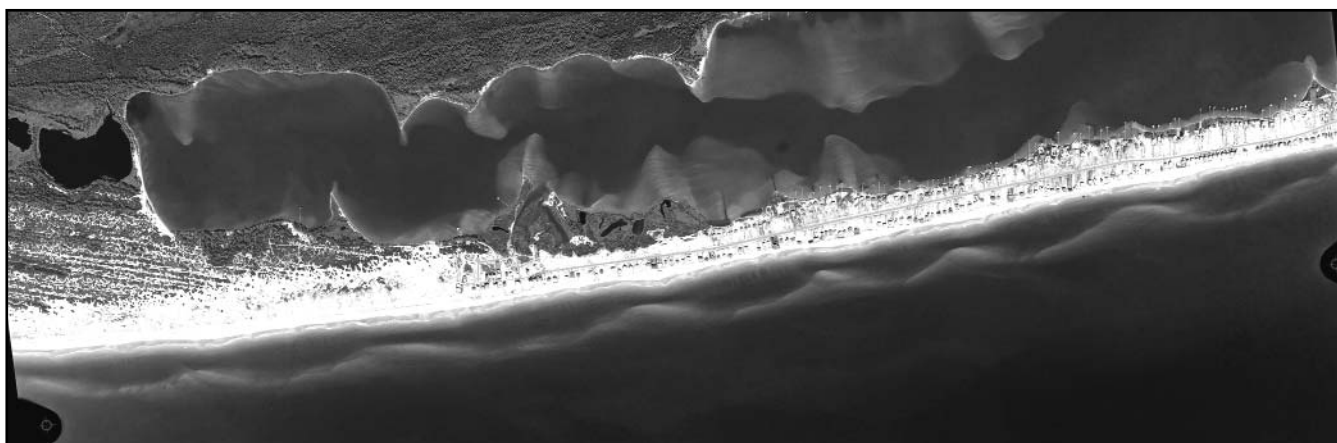
swimming, boating, hiking and picnicking, in addition to cottage lodging and camping facilities. One austere, 144-room concrete lodge existed in the park until Hurricane Ivan destroyed it in 2004. The State ultimately demolished the remnants of the lodge in 2006.

The State developed plans to replace the concrete lodge with a 350-room, \$100 million luxury resort and conference center. The State's proposal called for Auburn University, a public institution, to lease the hotel site from the State for a term no less than seventy (70) years, and then sublease it to a private Georgia-based company, the West Paces Hotel Group, for no longer than ninety-nine (99) years. Under the proposal, the West Paces Hotel Group would engage in construction, operation, and management of the facility, with assistance from students enrolled in Auburn University's hospitality industry program. The interested parties reduced the terms of this proposal to writing in a "Memorandum of Understanding Regarding Ground Lease Agreement" (Agreement) in October 2007.

Litigation

The operators of the Gulf Beach Hotel in nearby Orange Beach, former State Conservation Com-

Aerial photograph of Gulf Shores before Hurricane Ivan courtesy of NASA.



missioner Charley Grimsley, the Alabama State Employees Association, and others (Plaintiffs) challenged the proposed development as contrary to state law through the filing of a lawsuit against the parties to the Agreement (Defendants). Both the Plaintiffs and the Defendants filed motions with the court seeking summary judgment. Summary judgment is appropriate in circumstances where there are no genuine issues of material fact in dispute, whereby the court can decide the case as a matter of the applicable law, without the necessity of conducting a trial.¹

The Court's Ruling

Judge Reese granted the Plaintiffs' motion for summary judgment, concluding that the Agreement violated various provisions of state statutes and the Alabama Constitution. The court found that, under Alabama law, any facility at Gulf State Park must be operated and maintained by DCNR employees, due to the fact that money from a \$110 million bond issue, approved by Alabama voters for the construction and maintenance of state parks via a state constitutional amendment, was spent improperly on the proposed hotel and convention center.² Judge Reese rejected Defendants' assertions that, since they had repaid these monies, they avoided the requirement to utilize DCNR employees to operate and maintain any proposed facilities at the Park.

The court's order further explained that, for any development at Gulf State Park, the law requires that a Joint Legislative Committee on State Parks effectively and meaningfully consider the average per capita and average per family income of Alabama residents in approving the design and cost of lodging facilities at all State parks.³ In addition, the court ordered that Defendants could not enter into any concession contracts that fail to provide for the reasonableness of the concessionaire's charges to the public.⁴

In rejecting Defendants' contentions that the property at issue had been removed from the State Park System in accord with statutory exemptions,⁵ Judge Reese cited specific statutory provisions dictating that State park property remain State park property while under lease.⁶ Therefore, the court determined that the DCNR could not subvert Alabama's Land Sales Act because, while leasing state land to a public university might be appropriate, such a lease

would require the public university to comply with the strict provisions of the Land Sales Act before it could sublease state lands to a private entity.⁷

The court also chided the duration of the proposed lease and sublease, as Alabama law provides that DCNR may enter into concession contracts with persons, firms, or corporations limited in duration to six years, or, in exceptional circumstances where a contracting party expends significant sums of money to improve or enlarge existing or new facilities, to twelve years.⁸ Further, Judge Reese's order noted the absence of a competitive bidding process in selecting the West Paces Hotel Group to construct, manage and operate the hotel, in violation of state statute.⁹

As of this publication's editorial deadline, the Defendants had not filed court papers to appeal Judge Reese's ruling before the Alabama Court of Civil Appeals. For the time being, public debate continues between those claiming the development proposal will direct special benefits to a private business while pricing the average Alabamian out of use of the park, and those claiming the project will bring needed commercial business to this island community still suffering from the effects of the 2004 hurricane season.¹⁰

Endnotes

1. ALA. R. CIV. P. 56.
2. ALA. CONST. ART. XI § 213.32; ALA. CODE § 9-14A-1, *et seq.*
3. *Id.* § 9-14B-7.
4. *Id.* § 9-14-24(b).
5. *Id.* § 9-15-82.
6. *Id.* §§ 9-14-20 through 9-14-29.
7. *Id.* § 9-14-27; *Id.* § 9-15-70, *et seq.*
8. *Id.*
9. *Id.* § 9-14-20, *et seq.*
10. See, e.g., *Editorial, State Park Renovations Worth Cost*, MONTGOMERY ADVERTISER, July 7, 2008; *Editorial, Gulf State Park Plan Worth Pursuing*, MOBILE PRESS-REGISTER, July 2, 2008; Michael Rockwood, *Gulf Shores Building Plans Blocked*, <http://www.myfoxgulfcoast.com/myfox/pages - /News/Detail?contentId=6882616&version=1 - &locale=EN-US&layoutCode=TSTY&pageId = 3.2.1> (last visited July 9, 2008); Brian Lyman, *Judge Rejects Gulf State Park Hotel Plan*, MOBILE PRESS-REGISTER, June 28, 2008.

Public Comment Period Comes to a Close on Controversial New Regulations Affecting Coastal Development in Texas

Timothy M. Mulvaney, J.D.

In the spring of 2008, the Texas General Land Office (GLO) proposed new regulations to address coastal erosion in an effort to implement certain provisions of 2005 legislation. As the public comment period is coming to a close on August 15, 2008, debate on the regulations amongst landowners, municipalities, geologists, environmentalists, and recreational users of the Gulf shore is reaching a climax over issues of shore protection funding, public access and the alleged taking of private property without the provision of just compensation.

Background

In accord with a common law principle emanating from Roman times known as the public trust doctrine, states and coastal municipalities share the responsibilities as trustee of certain natural resources for the general public. Originally, in response to beachfront owners impeding Texans' longstanding practice of driving along the beach, the state legislature enacted the Open Beaches Act (OBA) in 1959.¹ The OBA defines these common law rights by stating that, while a beachfront

property owner may hold title to the dry sand beach, the beach seaward of the line of dune vegetation remains impressed with public rights of access and use if the public historically used the beach for those purposes (public access easement).

Amidst enforcement obstacles in light of intensifying coastal development, the legislature amended the OBA in 1991² to authorize the Commissioner of the GLO to promulgate regulations protecting these public rights.³ The amended OBA, as well as the state's Dune Protection Program,⁴ is intended to assist landowners and coastal communities in protecting and preserving these rights for the benefit of all Texans. The amended OBA also seeks to respect the rights of private property owners, and to that end recognizes circumstances where it may be necessary to convert vehicular access to pedestrian only beaches. Current GLO regulations provide guidance to coastal cities and counties for adopting beach access plans to protect the access rights and maintain a functioning beach and dune system to reduce the erosion of the state's beaches. The state reviews these local plans to assure they meet the minimum standards set forth in the GLO regulations.

In light of a significant annual erosion rate, and the resultant migration of both the seaward line of dune vegetation and the public access easement, many homes are now within the easement area. Indeed, along some stretches of coastline, waves lap up against the pilings of homes. Under the OBA, as amended in 1991 and following the expiration of a two-year enforcement moratorium in June of 2006,

Photograph of Texas sand dune courtesy of the Bureau of Economic Geology at the University of Texas, Austin, TX.



local governments have the authority to institute enforcement actions against the owners of these homes within the public easement area. When necessary to protect public health and safety, enforcement could result in removal or relocation of the homes on public beaches in erosion-prone areas.⁵

The Proposed Regulatory Changes

The proposed new regulations and regulatory amendments are divided into two major subsections. The first provides new procedures for local governments and the GLO to follow when processing beach construction certificates and dune protection permits, and when developing beach access and use plans. The second subsection offers guidelines for local governments that choose to adopt erosion response plans containing a building setback line that prevents building between that line and the water's edge.

The proposed guidelines identify specific factors that local governments should consider when selecting a setback line, in an effort to encourage counties to plan aggressively for erosion prior to requesting state funding for costly erosion control projects and disaster response assistance.⁶ For example, the regulations recommend that local governmental entities adopt erosion response plans with a setback from the line of dune vegetation that is 60 times the annual erosion rate, or 300 feet landward of the mean high water line, whichever is greater.

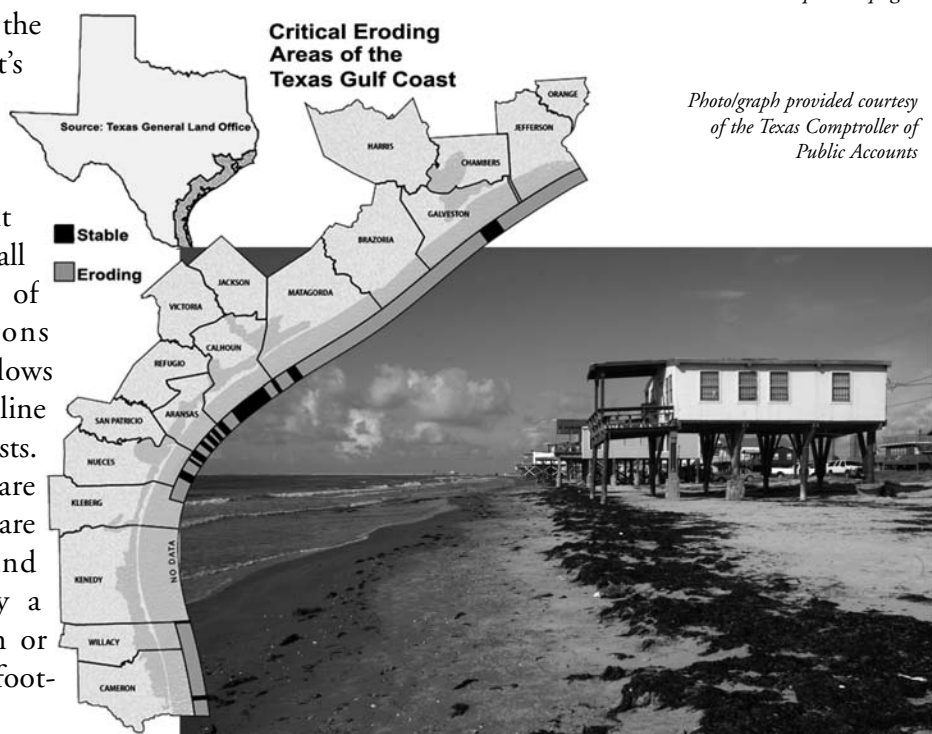
However, presumably in light of the United States Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Council*⁷ declaring a categorical unconstitutional taking when government regulation destroys substantially all economic and beneficial use of property, the new regulations include an exception that allows building seaward of the setback line if no practicable alternative exists. In addition, any areas that are already developed or platted are exempt from the regulations, and homes that are destroyed by a destructive event such as storm or fire can be rebuilt within the footprint of the original structure.

Compliance with the regulations if adopted, would be voluntary, as Texas's fourteen coastal counties adhere to their own beach management plans. However, those counties with standards lower than those set forth in the proposed regulations would risk losing state funding, distributed at the discretion of the Commissioner of the GLO, for erosion control projects such as shoreline stabilization and beach replenishment. Nueces County currently maintains the strictest coastal setback line in the state at 350 feet landward from the line of dune vegetation.⁸ On the other end of the spectrum, Galveston's current setback requirement is just 25 feet from the line of dune vegetation.⁹ The GLO contends that transformation in the way beach construction is authorized are necessary to convince state legislators to continue utilizing state taxpayer money for erosion control projects, and could result in property owners qualifying for reduced insurance rates under National Flood Insurance Program.¹⁰

Moving Forward

The GLO held two public hearings on July 8, 2008 in Galveston County, where the provisions regarding increasing local setback lines faced considerable opposition. As of this publication's editorial deadline, the GLO had not adopted the regulatory proposal. While coastal geologists and environmentalists

See Texas Coastal Development, page 14



Photograph provided courtesy of the Texas Comptroller of Public Accounts

Turkey Creek Community Initiatives Continues Fight to Preserve Wetlands

Turkey Creek Community Initiatives v. City of Gulfport, No. 1:07cv648LGJMR (S.D. Miss. 2008).

Stephanie Showalter, J.D./M.S.E.L.

In April 2008, the Land Trust for the Mississippi Coastal Plain acquired more than 150 acres of wetlands in Gulfport, Mississippi. The Land Trust hopes to acquire enough property to create and preserve a community greenway along Turkey Creek. While the acquisition received some media coverage, the back-story did not receive much attention. It is a story that deserves to be told. Step-by-step and piece-by-piece, one small non-profit organization in North Gulfport is preserving the past and protecting the future of a unique community.

Turkey Creek Community

In 1866, a small group of recently emancipated African-Americans purchased and settled 320 acres in what is now Harrison County, Mississippi. The community they built came to be known as the Turkey Creek community. Turkey Creek, which flows through the city of Gulfport, holds special value for the community. It was where people were baptized and children played. When African-Americans were banned from the beaches in the 1900s, they recreated along Turkey Creek. According to the Mississippi Heritage Trust, the Turkey Creek Community is a rarity in Mississippi - "a post-Civil War African-American community that retains much of its original architectural integrity."¹ The uniqueness of the community has even been recognized on the national level. In May 2007, the Turkey Creek Community Historic District was listed on the National Register of Historic Places.

Unfortunately, the Turkey Creek community is facing tremendous development pressures. The arrival of the casinos along the Mississippi Gulf Coast in the 1990s and the associated commercial sprawl threaten to destroy this unique place. In 2001, the Mississippi Heritage Trust listed the Turkey Creek Community as one of the state's Ten Most

Endangered Historic Places. The Turkey Creek Community Initiatives (TCCI) was founded in 2003 "to conserve, restore and utilize the unique cultural, historical and environmental resources of the Turkey Creek community and watershed for education and other socially beneficial purposes."²

One of the primary environmental problems in the Turkey Creek community is loss of wetlands to development. Turkey Creek was built on swampland and therefore has always been vulnerable to flooding, but the problem has increased over the years as development consumed wetlands.

Louisiana Avenue Outfall Drainage Project

In October 2001, the City of Gulfport received a permit under § 404 (dredge and fill of wetlands) of the Clean Water Act (CWA) to construct a storm water outfall drainage channel along Louisiana Avenue in the Turkey Creek community. The city received permission to "excavate a 2,660-foot-long open outfall drainage channel [on Louisiana Avenue] to improve local storm water management."³ The permit required that the excavated material be deposited on an upland disposal site. Work on the project did not begin until late 2005.

Several problems arose during the excavation of the drainage channel. First, according to a cease and desist order issued by the U.S. Corps of Engineers (Corps) on April 17, 2006, the city violated the CWA by allowing excessive fill at the project site increasing the project's wetland impacts. In addition, Glynn W. Leonard, Inc., the contractor hired by the City, placed the excavated material on an adjacent empty lot which resulted in the unauthorized fill of 1.38 acres of hardwood wetlands. The City also violated CWA regulations by failing to obtain an individual permit for its storm water discharges or seek coverage under the state of Mississippi's general permit.

In 2007, TCCI and the Gulf Restoration Network (GRN) took the City of Gulfport to court. TCCI and GRN sought a court order compelling the City to remove the improperly deposited materials,

remedy the storm water violations, revegetate the site, and pay civil penalties. The Defendants denied any and all liability under the CWA, but agreed to a settlement. Glynn W. Leonard was required to pay \$8,000 to the Land Trust to be used exclusively for remediation of wetlands in the Turkey Creek Watershed. Leonard was also required to pay \$2,000 of the plaintiffs' attorneys fees.

The City of Gulfport agreed to transfer to the Land Trust all properties in the watershed purchased from February 2007 to December 2007 with Coastal Impact Assistance Program (CIAP) funds. The CIAP, established by the Energy Policy Act of 2005, authorizes funds to be distributed to Outer Continental Shelf (OCS) oil and gas producing states to mitigate the impacts of OCS oil and gas activities. Mississippi is one of six states eligible to receive funds. In April 2008, more than 156 acres of wetlands in the Turkey Creek area were transferred by the city to the Land Trust.⁴

As a largely symbolic gesture, the City of Gulfport also passed a non-binding resolution supporting the federal policy of in-watershed mitigation of wetlands losses. The resolution states that "the City of Gulfport supports and endorses the federal policy that permitted wetlands losses within the Turkey Creek watershed in the jurisdictional limits of the City be mitigated within the boundaries of the Turkey Creek watershed to the maximum extent practicable." The resolution also requested that the Corps and other responsible agencies "enforce regulations to insure that such wetland losses are mitigated to the extent practicable within the Turkey Creek watershed."⁵

Conclusion

Although a battle was won, the war is far from over. Other battles rage. TCCI's lawsuit against the Corps over Regional General Permit SAM-20 (RGP) was recently transferred to the federal district court for the Southern District of Mississippi. The RGP was issued by the Corps in May

2007 to accelerate coastal Mississippi's recovery from Hurricane Katrina. Individual permits are not needed for projects qualifying for coverage under the RGP and authorized projects (primarily residential construction) may impact up to three acres of wetlands. In its original complaint in the D.C. district court, TCCI alleged that the regional general permit violates the Clean Water Act, the National Environmental Policy Act, and other federal laws.⁶

Endnotes

1. Mississippi Heritage Trust, Ten Most Endangered List 2001, *available at* <http://www.mississippiheritage.com/list01.html#8>.
2. Turkey Creek Community Initiatives, About TCCI, http://www.turkey-creek.org/Content-/10001/ABOUT_TCCI.html.
3. *Turkey Creek Community Initiatives v. City of Gulfport*, No. 1:07cv648LGJMR, Complaint for Declaratory and Injunctive Relief at 7 (S.D. Miss. May 16, 2007).
4. Megha Satyanarayana, *Turkey Creek Goes Green: Land Trust Saves Wetlands*, THE SUN HERALD (Biloxi, MS), Apr. 15, 2008.
5. *Turkey Creek Community Initiatives v. City of Gulfport*, No. 1:07cv648LGJMR, Consent Decree, Exhibit A (S.D. Miss. Apr. 3, 2008).

Photograph of young volunteers working at the Turkey Creek watershed courtesy of Turkey Creek Community Initiatives.



Florida Wrecking Statue Declared Unconstitutional

Towboat One, Inc. v. M/V Waterdog, 2008 U.S. Dist. LEXIS 48628 (S.D. Fla., June 24, 2008).

Stephanie Showalter, J.D./M.S.E.L.

The U.S. District Court for the Southern District of Florida recently struck down as unconstitutional a 180-year old statute requiring wreckers to obtain a license from a district court before commencing salvage operations.

Background

While operating in navigable waters off the coast of Florida in October 2007, the M/V *Waterdog* began taking on water due to a malfunction in its bilge-pumping system. Towboat One, a salvage company, responded to *Waterdog's* distress signal. Towboat One was able to “de-water” the ship and navigate the *Waterdog* back to port. Since ancient times, “a salvor of imperiled property on navigable waters gains a right to compensation from the owner.”¹ When *Waterdog* disputed Towboat One’s bill, the salvage company filed suit in federal district court to determine the amount owed and force payment.

Waterdog raised a number of affirmative defenses in its answer to Towboat One’s complaint. In one of its affirmative defenses, *Waterdog* argued that Towboat One lacked the requisite salvage license and therefore may be precluded from a salvage award or may have its award reduced. Towboat One filed a motion to strike claiming the license requirement is unconstitutional.

Florida Wrecking Statute

46 U.S.C. § 80102(a) mandates that “to be regularly employed in the business of salvaging on the coast of Florida, a vessel and its master each must have a license issued by a judge of the district court of the United States for a judicial district of Florida.” The original statute, passed in 1828, was addressed to “wreckers,” the term then used to describe individuals engaged in salvage operations in the Florida Keys. The statute was apparently passed to protect merchant ships from shady characters who were placing lanterns near the reefs and luring merchant ships into

dangerous waters where the cargo could be looted after the wreck. Under the statute, “wreckers who lacked a license forfeited the right to any award for their efforts.”²

Before Florida was admitted to the Union in 1845, wrecker licenses were issued by the territorial court of the Florida Keys. After 1845, the licenses were issued by the federal judge sitting in the Florida Keys. Although questions were raised over the years about the statute’s constitutionality, the law was obscure and virtually ignored. Then in 2006 Congress re-codified

*. . . during the
recodification
the term “wrecking”
was replaced
with “salvage.”*

Title 46 of the U.S. Code. During the re-codification, the term “wrecking” was replaced with “salvage.” Soon thereafter the Florida district courts began receiving petitions for salvage licenses.

The District Court granted Towboat One’s motion to strike on constitutional grounds. Article III, Section 1 of the U.S. Constitution vests judicial power in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Courts do not generally issue licenses. “The issuance of licenses for salvaging off the coast of Florida is not an action taken in furtherance of carrying out a judicial act or part of the Court’s governance of the proceedings before it.”³ Licenses are usually issued by administrative agencies in the Executive Branch. According to the district court, because an “Article III court can exercise no other power than the judicial power,” the Congressional mandate that Florida district court

Alabama Waterfront Access Study Committee

Stephanie Showalter, J.D./M.S.E.L.

On May 18, 2008, the Alabama Legislature passed a resolution (H.J.R. 656) establishing a Waterfront Access Study Committee. The resolution was a result of efforts by the Alabama Working Waterfront Coalition, a group of working waterfront stakeholders facilitated by Auburn University Marine Extension and Research Center/ Mississippi-Alabama Sea Grant Consortium. The Committee, which includes representatives from the state legislature, state and federal agencies, the commercial and recreational fishing industry, local government, and other relevant sectors, will “study the degree of loss and potential loss of the diversity of uses along the coastal shoreline of Alabama and how these losses impact access to the public trust waters of the state.” The Committee will be chaired by the director of the Mississippi-Alabama Sea Grant Program.

The Legislature charged the Committee with five specific tasks:

- Assess the applicability of such tools and techniques to the coastal shorelines of Alabama.
- Prepare a draft report with a statement of the issues, a summary of the research, and recommendations to address issues of diversity of waterfront use and access in Alabama.
- Hold at least three public meetings to present the draft report and recommendations to the public and user groups.



Photograph of shrimp boats at a working waterfront courtesy of Melissa Schneider, Communications Coordinator Mississippi-Alabama Sea Grant Consortium.

- Gather information about local land-use management and zoning, current shoreline development trends, and local tax rates, including tax assessment trends for shoreline properties.
- Collect research and information from Alabama and other states and jurisdictions regarding incentive-based techniques and management tools used to preserve waterfront diversity.

The Committee’s final report is due in 2010. An interim report is due at the beginning of the Legislature’s 2009 Regular Session. North Carolina formed a similar waterfront access study committee in 2007. That committee’s final report containing twenty-seven recommendations for the North Carolina legislature is available at http://www.ncseagrant.org/files/WASC_FINAL_web.pdf.

Texas Coastal Development, from page 9

applaud the proposed regulations as a prudent response to sea level rise associated with a changing climate and a reasonable measure to combat the degradation of public rights to natural resources through over-development, many shoreline residents and local officials are concerned that the regulations would significantly diminish home values and the associated tax base, daunt development, and provide insurance companies with justification to deny claims or increase premiums for weather-related insurance.¹¹ Stay tuned to Water Log for continuing coverage of these proposed regulations, and please contact Water Log's associate editor at tmulvane@olemiss.edu if similar public access or setback disputes have arisen in your community.✓

Endnotes

1. 1959 Tex. Sess. Laws Serv. page no. 108 (West).
2. TEX. NAT. RES. CODE ANN. § 61.001 et seq.
3. *Id.* § 61.011(d).
4. *Id.* § 63.001 et seq.
5. The State provides some financial compensation for removal and relocation. *See, generally*, Eddie

R. Fisher and Angela L. Sunley, *A Line in the Sand: Balancing the Texas Open Beaches Act and Coastal Development* (July 22, 2007) (presentation at the Proceedings of Coastal Zone 2007, Portland, OR), available at http://www.csc.noaa.gov/cz/2007/Coastal_Zone_07_Proceedings/PDFs/Tuesday_Abstracts/2658.Fisher.pdf (noting that Commissioner of GLO has offered up to \$50,000 for removal or relocation for homes 100% seaward of the line of dune vegetation).

6. Leigh Jones, *Surfside Shows Need for Setback Rules*, THE GALVESTON DAILY NEWS, June 28, 2008.
7. 505 U.S. 1003 (1992).
8. Beth Wilson, *Texas Prepares Rules on Beaches*, CORPUS-CHRISTI CALLER TIMES, April 13, 2008.
9. Leigh Jones, *Beach Building Rules Set Up Coastal Clash*, THE GALVESTON DAILY NEWS, June 22, 2008.
10. Leigh Jones, *Locals Still Suspicious on Beach Setback Rules*, THE GALVESTON DAILY NEWS, July 9, 2008.
11. Jones, *supra* note 6.

Wrecking Statutes, from page 12

judges issue salvage licenses is unconstitutional.⁴ Towboat One had no obligation to obtain a license under an unconstitutional statute and *Waterdog* cannot argue that the lack of a license subjects Towboat One to less than full recovery.✓

Endnotes

1. Thomas J. Schoenbaum, Admiralty and Maritime Law, § 14-1 (4th ed. 2003).
2. *Towboat One, Inc. v. M/V Waterdog*, 2008 U.S. Dist. LEXIS 48628 at *5-6 (S.D. Fla., June 24, 2008).
3. *In re Beck*, 526 F. Supp. 2d 1291, 1304 (S.D. Fla. 2007).

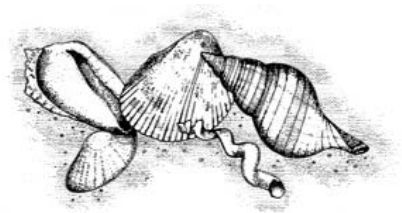
4. *Towboat One*, 2008 U.S. Dist. LEXIS 48628 at *7.

Photograph courtesy of (c) Wolcott Henry 2005/Marine Photobank.



Interesting Items

Around the Gulf...



The Alabama Department of Environmental Management fined Chevron \$30,000 for releasing higher amounts of volatile organic compounds (VOCs) than permitted at the Hatter's Pond natural gas field near Creola, Alabama. The field is owned by Four Star Oil and Gas, which is operated and partially owned by Chevron. VOCs are emitted as gases from certain solids and liquids and contain a variety of hazardous chemicals, including benzene, which may cause adverse health effects upon exposure. Four Star had been cited in 2004 and 2005 for similar air pollution problems.

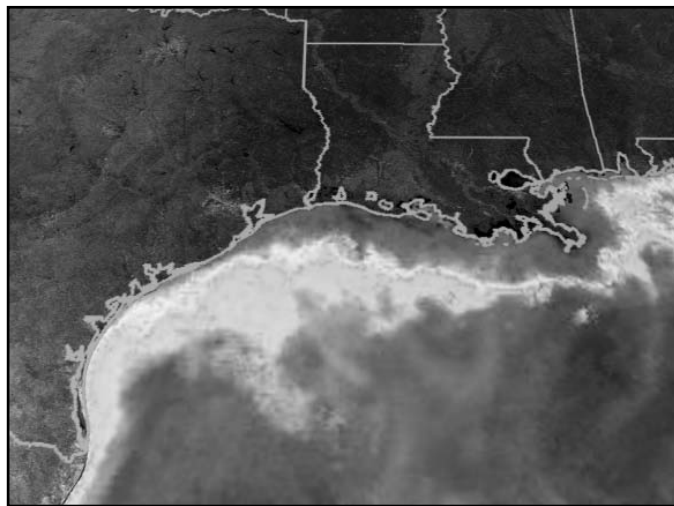


Catfish drawing courtesy of the USFWS.

According to the *New York Times*, rising prices for corn and soybean feed are driving some catfish farmers out of business. Today, more than half the cost of raising catfish is feeding them. In an industry already struggling to compete against cheaper foreign imports, the rise of feed is simply too much for some producers. This is bound to have significant ripple effects in regions, like the Mississippi Delta, heavily invested in catfish farming. Empty ponds mean less jobs, both on the farms and in processing plants.

The forecast for this summer's "dead zone" in the Gulf of Mexico is pretty grim. The "dead zone" is an area where seasonal oxygen levels drop too low to support life. The phenomenon is caused when algal growth, which has been stimulated by nutrient loading, settles to the bottom. The decaying algae consume oxygen faster than it can be replenished. Because the massive Midwest floods are expected to deliver higher than usual amounts of nitrogen and phosphorus to the Gulf, scientists at the University of Michigan School of Natural Resources and the Environment predict the hypoxia area to cover between 8,400 - 8,800 square miles off the Louisiana-Texas coast. If their prediction holds true, this would be the largest dead zone on record.

Aerial view of the Gulf of Mexico's dead zone courtesy of NASA.



For readers following the expansion of the strategic petroleum reserve in Richton, Mississippi, a new resource is available - *the Richton Reporter*, a quarterly newsletter by the Department of Energy's Office of Strategic Petroleum Reserves for the Richton Supplemental Environmental Impact Statement (SEIS) process. The Summer 2008 issue contains basic information about the project and the SEIS process. The comment period on the content and scope of the SEIS closed on April 29, 2008. The DOE will now begin work on the draft SEIS due out late this year or early next year. The *Richton Reporter* and additional information about the project is available at <http://fossil.energy.gov/programs/reserves/spr/expansion-eis.html> .

WATER LOG (ISSN 1097-0649) is supported by the National Sea Grant College Program of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration under NOAA Grant Number NA060AR4170078, the Mississippi-Alabama Sea Grant Consortium, State of Mississippi, Mississippi Law Research Institute, and University of Mississippi Law Center. The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the Mississippi-Alabama Sea Grant Legal Program, The Mississippi-Alabama Sea Grant Consortium or the U.S. Department of Commerce. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. Graphics and/or photographs by ©Nova Development Corp., or as noted by the photograph.



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MASGP-08-003-02

*This publication is printed on recycled paper.
August, 2008*



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

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