

# WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

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## Mississippi Climate Change Lawsuit Proceeds

*Comer v. Murphy Oil USA*, — F.3d —, 2009 WL 3321493 (5th Cir. Oct. 16, 2009).

*Niki L. Pace, J.D., LL.M.*

Reversing a lower court decision, the Fifth Circuit recognized a plausible link between greenhouse gas emissions and climate change thereby allowing the property damage claims of Mississippi Gulf coast landowners to proceed against a variety of U.S. industries. Relying heavily on the Supreme Court decision in *Massachusetts v. EPA*, the court held that the landowners satisfied standing requirements for their claims of nuisance, trespass, and negligence and that the claims were not precluded by the political question doctrine.<sup>1</sup>

### Background

Landowners and residents of the Mississippi Gulf coast who suffered property damage during Hurricane Katrina (collectively, *Comer*) filed a class action against numerous members of the energy, fossil fuel, and chemical industries (collectively, *Murphy Oil*). *Comer* alleged *Murphy Oil* contributed to climate change through its greenhouse gas emissions which increased global surface temperatures causing sea level rise and contributing to the ferocity of Hurricane Katrina. According to *Comer*, these events culminated in the destruction of both private property and useable public property for which *Comer* seeks damages.

*Murphy Oil* challenged *Comer's* standing to bring suit and argued that, even if *Comer* had standing, the lawsuit was barred by the political question doctrine. The district court agreed with *Murphy Oil* and dismissed the lawsuit prompting *Comer's* appeal.

### Standing: Traceability

Standing requires plaintiffs to demonstrate an injury in fact which is fairly traceable to the defendant's actions and redressable by a favorable decision.<sup>2</sup> In this instance, *Murphy Oil* conceded injury in fact and redressability but contended that *Comer* failed to meet the traceability requirement. As the court succinctly stated, *Murphy Oil* "argue[d] that traceability is lacking because: (1) the causal link between emissions, sea level rise, and Hurricane Katrina is too attenuated, and (2) the defendants' actions are only one of many contributions to greenhouse gas emissions, thereby foreclosing traceability."<sup>3</sup>

Unpersuaded, the court noted that the Supreme Court in *Massachusetts v. EPA* rejected similar arguments and “accepted as plausible the link between man-made greenhouse gas emissions and global warming.”<sup>4</sup> The court likewise rejected Murphy Oil’s assertion that because it only minimally contributed to Comer’s injuries, traceability was lacking.

### Political Question

Murphy Oil maintained Comer’s claims presented a nonjusticiable political question. The political question doctrine stems from the separation of powers between executive, legislative, and judicial branches of government; it prohibits courts from deciding matters that are exclusively committed to Congress or the president by the Constitution or constitutional federal laws or regulations.<sup>5</sup> As remarked by the court, the doctrine embodies “a limited exception to the rule that ‘federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.’”<sup>6</sup>

Noting that common-law tort claims like those alleged by Comer rarely raise a political question, the court further stressed Murphy Oil’s failure “to articulate how any material issue [in this case] is exclusively committed by the Constitution or federal laws to the federal political branches.”<sup>7</sup> The court recognized Mississippi’s long-established standards for judging nuisance, trespass, and negligence claims and found no reason that adjudication of the case “would express or imply any lack of respect” towards other federal government branches.<sup>8</sup> Case law cited by Murphy Oil was

equally unpersuasive and misplaced, leading the court to conclude the suit did not present a political question.

*The court recognized Mississippi’s long-established standards for judging nuisance, trespass, and negligence claims . . .*

### Conclusion

The court declined to find standing for the claims of unjust enrichment, civil conspiracy, and fraudulent misrepresentation. The court, in dicta, expressed doubt about Comer’s ability to successfully demonstrate causation under Mississippi law.<sup>9</sup> While this decision is undoubtedly a victory for Comer, substantial evidentiary hurdles lie ahead. ↗

Photograph of rebuilding efforts on the Mississippi Gulf coast by Waurene Roberson.



### Endnotes

1. *Comer v. Murphy Oil USA*, — F.3d —, 2009 WL 3321493 (5th Cir. Oct. 16, 2009).
2. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).
3. *Comer*, 2009 WL 3321493, at \*6.
4. *Id.*
5. *Id.* at \*10.
6. *Id.* at \*13 (quoting *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358 (1989)).
7. *Id.* at \*14, \*16.
8. *Id.* at \*16.
9. *Id.* at \*20.

# New Developments in Gulf of Mexico Aquaculture Plan

*Amy Lubrano, J.D., LL.M.*

On September 3, 2009, the Fishery Management Plan for Regulating Offshore Marine Aquaculture in the Gulf of Mexico (Gulf FMP or Plan) took effect when the National Oceanic and Atmospheric Administration (NOAA) failed to take any action with regard to the Plan. Applications for offshore aquaculture permits in the Gulf will not be accepted until implementing regulations are in place, so it could still be months or even years before there is any offshore aquaculture activity in the Gulf.

## Background

The United States currently imports 84% of its seafood supply.<sup>1</sup> The U.S. seafood trade deficit is \$9.4 billion, second only to oil in the natural resources category. Worldwide, aquaculture is a \$70 billion industry, and is the fastest growing form of food production in the world.<sup>2</sup> About half of U.S. seafood imports are from aquaculture.<sup>3</sup> Offshore aquaculture is the cultivation of aquatic organisms in controlled environments, such as cages or net pens, in federally managed areas of the ocean.<sup>4</sup> Federal waters begin where state jurisdiction ends and extend 200 miles offshore.

Currently, several aquaculture operations are conducting research and commercial production in state waters. NOAA has also approved some offshore aquaculture activities, including live rock aquaculture in the Gulf of Mexico and South Atlantic and an area enclosure for scallop aquaculture in New England.<sup>5</sup> However, the Gulf FMP is the first plan that would permit commercial finfish aquaculture operations in U.S. federal waters. Offshore aquaculture is preferable to nearshore aquaculture because there are fewer competing uses, such as fishing and recreation, farther from shore. Also, deeper and stronger water flows found farther from shore ease mitigation of environmental impacts, such as nutrient and organic loading.<sup>6</sup>

The Gulf FMP provides the framework for permitting and regulating an estimated 5 to 20 offshore aquaculture operations in the Gulf of Mexico over the next 10 years. Each permit will be issued for an initial 10-year period and subject to renewal every 5 years.<sup>7</sup> The Gulf Council predicts that the Gulf FMP will pro-

duce up to 64 million pounds of seafood each year, an amount that is equivalent to more than half of the annual commercial catch off the Texas coast.<sup>8</sup>

The Gulf FMP includes a number of environmental safeguards. These safeguards include: limiting the species that may be cultured to Gulf Council-managed species (except shrimp and corals) that are native to the Gulf of Mexico; prohibiting aquaculture operations from being sited in certain areas; capping the total amount of fish that can be cultured annually, as well as the relative contribution of each individual operation to the annual cap; and establishing numerous record-keeping, reporting, and operation requirements designed to minimize or mitigate potential environmental impacts.<sup>9</sup>

## NOAA's Decision Regarding the Regional Plan

The Gulf of Mexico Fishery Management Council (Gulf Council) approved the Gulf FMP on January 27, 2009, and then subsequently sent the Plan to NOAA's National Marine Fisheries Service (NMFS) for Secretarial review. Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA), NMFS provided public notice and comment beginning June 4, 2009 and ending sixty days later on August 3, 2009.<sup>10</sup> The Secretary had thirty days thereafter to approve, disapprove, or partially approve the Plan.<sup>11</sup> Instead, the Secretary chose no action and the Gulf FMP entered into effect by operation of law on September 3, 2009.<sup>12</sup>

In a letter to the Chairman of the Gulf Council, James Balsiger, NOAA's Acting Assistant Administrator for Fisheries, discussed NMFS's unprecedented approach to Secretarial review of the Gulf FMP. According to Mr. Balsiger, the only potentially viable basis for disapproval of the Gulf FMP that NOAA identified was a determination that it does not have authority to regulate aquaculture under the MSA. However, this conflicts with NOAA's longstanding position that the definition of "fishing" encompasses aquaculture under the MSA. Furthermore, if NOAA were to disapprove the Gulf FMP on this basis, there would be no overarching authority to address environmental and fishery concerns for aquaculture operations in federal waters. While the U.S. Army Corps of Engineers and the

Environmental Protection Agency do have some regulatory authority over siting and water quality issues, Mr. Balsiger stressed that other marine resource conservation concerns such as fisheries management and fish habitat in federal waters could not be addressed without NOAA's MSA authority.<sup>13</sup> Because there is no other comprehensive legislative authority for regulating offshore aquaculture, NOAA concluded that a decision that would remove its own authority to regulate aquaculture under the MSA was not an acceptable outcome. Rather, it did not take any action on the Gulf FMP, thereby allowing the Plan to take effect by operation of law and preserving its authority to later implement a national aquaculture framework.

On October 2, 2009, two advocacy groups filed a lawsuit in federal court in Washington, D.C., challenging the Gulf FMP and alleging that NOAA failed to conduct required environmental reviews under the MSA and the National Environmental Policy Act. The groups further argue that NOAA and the Gulf Council do not have authority to pursue permits under the MSA. The groups are asking the court to throw out the Plan before implementing rules are written.<sup>14</sup>

### National Plan

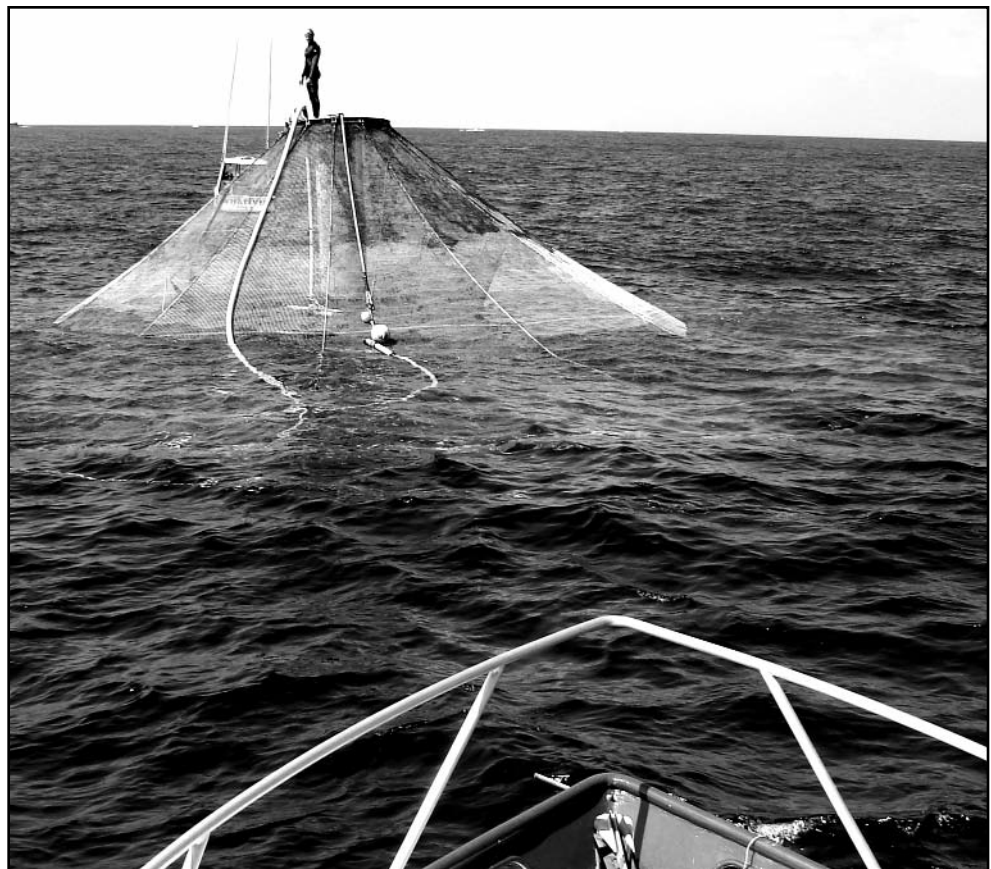
Although NOAA allowed the Gulf FMP to take effect, the Agency believes that offshore aquaculture activities should be governed by a comprehensive, ecosystem-based, national policy rather than by regional regulatory frameworks.<sup>15</sup> On September 3, 2009, NOAA announced its intent to develop a comprehensive national policy for permitting and regulating offshore aquaculture. According to NOAA Administrator Jane Lubchenco, the national policy will focus on the protection of ocean resources and marine ecosystems, address the fisheries management issues posed by aquaculture, and allow U.S. aquaculture to proceed in a

sustainable way. For this reason, NOAA announced that it will develop a national policy within the coming months.<sup>16</sup> Among the reasons NOAA stated for pursuing a national offshore aquaculture program are the belief that such a program would move the United States towards becoming more self-sufficient in the production of healthy seafood, providing jobs for coastal communities, and reducing the seafood trade deficit.<sup>17</sup>

NOAA believes that the regulations for a national offshore aquaculture program should:

1. Include terms and conditions to conserve and protect our living marine resources and marine ecosystems and to address fisheries management issues posed by aquaculture activities, including the placement of aquaculture facilities, species selection, genetic and ecological risks of escapes, risk of disease transfer, and other potential adverse impacts to wild fish stocks, fish habitat, ecosystem functioning and other living marine resources.
2. Ensure a coordinated federal regulatory process for permitting aquaculture facilities

*Photograph of submersible cage sitting on the surface for cleaning and inspection courtesy of NOAA.*



in federal waters and provide regulatory certainty for potential investors.

3. Allow NOAA to work with other federal agencies to clarify various regulatory responsibilities and to provide the scientific information needed for permitting decisions.<sup>18</sup>

If the Gulf FMP is inconsistent with the national policy NOAA develops, the agency will have the abili-

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## *NOAA expects there to be little difference between the plans.*

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ty to seek amendments or withdrawal of the Plan through the MSA process.<sup>19</sup> However, according to James Balsiger, NOAA expects there to be little difference between the plans.<sup>20</sup>

### Conclusion

It is clear that NOAA is committed to developing a federal permitting and regulatory system for offshore aquaculture. Whether the Gulf FMP will lead to offshore aquaculture activities in the Gulf of Mexico is somewhat less clear, in light of the recent lawsuit filed against the Plan. Even if the court does not throw it out, implementing regulations must first be developed before any permits can be issued under the Plan.✎

### Endnotes

1. See Cain Burdeau, *Federal Agency Approves Plan for Gulf Fish Farming*, CHATTANOOGA TIMES FREE PRESS, Sept. 4, 2009.
2. *Offshore Aquaculture: Hearing Before the Subcomm. on Insular Affairs, Ocean and Wildlife of the H. Comm. on National Resources*, 111th Cong. 3 (2009) (statement of James W. Balsiger, Acting Asst. Adm'r for Fisheries, NOAA, U.S. Dept. of Commerce) (hereinafter "Balsiger Testimony").
3. See Press Release, NOAA, U.S. Dept. of Commerce, NOAA to Pursue National Policy for Sustainable Marine Aquaculture (Sept. 3,

2009) (hereinafter "NOAA Press Release") (on file with author).

4. See Gulf of Mexico Fishery Management Council, Fishery Management Plan for Managing Offshore Aquaculture Frequently Asked Questions (Sept. 2008) (hereinafter "FAQs 2008") (on file with author).
5. See Gulf of Mexico Fishery Management Council, Fishery Management Plan for Regulating Offshore Marine Aquaculture in the Gulf of Mexico, Frequently Asked Questions (Sept. 2009) (hereinafter "FAQs 2009") (on file with author).
6. See FAQs 2008, *supra* note 4.
7. See FAQs 2009, *supra* note 5.
8. Matthew Tresaugue, *Agency's Non-decision Opens Gulf to Fish Farming*, HOUSTON CHRON., Sept. 4, 2009.
9. See FAQs 2008, *supra*, note 4.
10. 16 U.S.C. 1854, 104-297(a)(1)(B) (2007).
11. *Id.* at 104-297(a)(3).
12. See NOAA Press Release, *supra* note 3.
13. Letter from to James W. Balsiger, Ph.D., Acting Asst. Adm'r for Fisheries, NMFS, to Dr. Robert Shipp, Chairman, Gulf of Mexico Fishery Management Council (Sept. 3, 2009) (hereinafter "Balsiger Letter") (on file with author).
14. See Allison Winter, *Lawsuit aims to block deepwater aquaculture in Gulf of Mexico*, GREENWIRE, Oct. 5, 2009.
15. Balsiger Letter, *supra* note 13.
16. See NOAA Press Release, *supra* note 3.
17. Balsiger Testimony, *supra* note 5 at 5-6.
18. Balsiger Letter, *supra* note 13.
19. *Id.*
20. Tresaugue, *supra* note 8.

*Photograph of cobia in cage courtesy of NOAA.*



# Court Rules in Tri-State Water Dispute

*In re Tri-State Water Rights Litigation*, — F. Supp. 2d —, 2009 WL 2371506 (M.D.Fla. Jul. 17, 2009).

*Jonathan Proctor, 2010 J.D. Candidate, University of Mississippi School of Law*

In the ongoing tri-state dispute over water withdrawals from Lake Lanier, a Florida district court ruled that the U.S. Army Corps of Engineers violated the Water Supply Act (WSA) by allocating roughly 19% of the reservoir for water supply without first seeking congressional authorization. These withdrawals, primarily for the metro Atlanta region, strain the water supply for downstream areas in Alabama and Florida. The Corps and municipalities have three years to obtain congressional approval for these withdrawals; without such approval, the unauthorized water withdrawals must cease.

## Background

The Rivers and Harbors Acts of 1945 and 1946 authorized the Corps to construct a dam and reservoir north of Atlanta, Georgia. Located on the Chattahoochee River, these projects became Buford Dam and Lake

*Photograph of Lake Lanier in fall of 2007 courtesy of NOAA.*



Lanier.<sup>1</sup> Initial reports on the construction's viability focused on the anticipated hydroelectric power, navigational, and flood control benefits, while also allowing for some incidental water supply benefits for metro Atlanta.<sup>2</sup>

The court reviewed at length various Corps reports, congressional testimony, and other sources regarding the purpose and scope of the Buford Dam project. Throughout planning and construction, the water supply benefits for Atlanta and the surrounding areas were best understood to be incidental: by more effectively managing the Chattahoochee River's flow, Atlanta would have a more constant supply of water. At the time, Atlanta's supply was affected by droughts. What began as an indirect supply of water via flood control, however, became a direct one through the city's withdrawals from Lake Lanier.<sup>3</sup>

Over the years, Atlanta's population grew precipitously, increasing the city's water needs beyond those envisioned during Buford Dam's planning and construction (a problem compounded by the city's failure to expand its waste treatment facilities to accommodate the growing population).<sup>4</sup> Of the project's initial \$55 million cost, more than \$44 million was provided for

the purposes of hydropower; significantly, no funds were allocated to the project explicitly for water supply. The states of Georgia, Florida, and Alabama (along with cities and organizations located therein) eventually found themselves embroiled in a lawsuit primarily questioning whether the Corps violated § 301 of the WSA with regards to the water supply allocations from Lake Lanier. The court found that, under the WSA, "the Corps may set aside storage for water supply in a previously constructed reservoir as long as (1) the beneficiaries of that storage pay a proportionate share of the costs of the pro-

ject, and (2) the modification does not seriously affect the project's purposes or constitute a major structural or operational change."<sup>5</sup>

### Authorized Purpose

Relying on the previously discussed legislative history and other evidence, the court found it obvious that during the planning and construction phases of the Buford Dam, its primary purposes were flood control, navigation, and hydropower.<sup>6</sup> Though both Congress and the Corps discussed incidental water supply benefits in the project's planning stages, they were not specifically authorized by Congress. Accordingly, since the project's completion (and until at least 2002) the Corps has consistently recognized the need for congressional approval for water supply withdrawals. The court "[came] to the inescapable conclusion that water supply, at least in the form of withdrawals from Lake Lanier, is not an authorized purpose of the Buford project."<sup>7</sup> If unauthorized by Congress, water supply withdrawals that constitute a major change to or seriously affect the authorized purposes are in violation of the WSA.

### Major Operational Change

Since 1990, the Corps has allowed municipalities near Lake Lanier to withdraw large amounts of water without proper congressional authorization. These withdrawals, examined in terms of gallons drawn per day and other scientific considerations, clearly constitute a "major operational change," according to the court. In fact, binding previous proceedings in this case held that "a reallocation of 22% of Lake Lanier's conservation storage was a major operational change 'on its face.'"<sup>8</sup> Whether following the Corps's recommended calculations or those employed by previous courts in this case, the effects remain significant. The WSA requires congressional approval for any major changes to a project's stated purposes; the Corps failed to obtain this approval, rendering these withdrawals illegal.

### Seriously Affect Project Purposes

The project's initial purposes of hydropower and navigation, according to the Corps, would not be significantly affected by the accommodation of existing water supply needs, ultimately causing "only a one percent reduction in hydropower generation."<sup>9</sup> Not only did the court refuse to accept the Corps's calculations in this regard, but disagreed with its general premise; a decrease in hydropower by 1% may seem insignificant,

but the area's demand for water is only expected to increase, making the cumulative loss of hydropower much greater.

Additionally, the court considered evidence that water supply withdrawals have significantly affected the amount of hydropower generated by Buford Dam, placing particular emphasis on the \$59 million difference between the dam's estimated and actual production.<sup>10</sup> Disagreeing with the Corps's reasoning for allowing these withdrawals and in light of evidence demonstrating the actual effects of water supply allocations, the court determined that "[t]he Corps's decision to support water supply has seriously affected the purposes for which the Buford project was originally authorized. The Corps is therefore in violation of the WSA."<sup>11</sup>

### Conclusion

Recognizing the inherent dangers of immediately cutting off a region's water supply, the court stayed the matter for three years. During this time, the parties may petition Congress to approve the previously discussed water supply withdrawals from Lake Lanier or seek some other resolution of the matter. However, Georgia parties are appealing the decision.<sup>12</sup> Plans are already underway for an alternate reservoir near Atlanta, but Alabama officials fear that the proposed reservoir will only compound the problem by draining water from another river, the Coosa.<sup>13</sup> Without another viable solution to the region's water supply, Georgia, Alabama, and Florida may find themselves again embroiled in a similar dispute.✶

### Endnotes

1. In re Tri-State Water Rights Litigation, — F. Supp. 2d —, 2009 WL 2371506, at \*1 (M.D.Fla. Jul. 17, 2009).
2. *Id.* at \*3-4.
3. *Id.* at \*14.
4. *Id.*
5. *Id.* at \*36.
6. *Id.* at \*37.
7. *Id.* at \*39.
8. *Id.* at \*42.
9. *Id.* at \*43.
10. *Id.* at \*44.
11. *Id.* at \*45.
12. Order, In re Tri-State Water Rights Litigation, No. 3:07-252 (M.D.Fla. Oct. 5, 2009).
13. Mary Orndorff, *Georgia proposal churns up water wars; Reservoir plan might tap Coosa too much*, THE BIRMINGHAM NEWS (Alabama), Sept. 29, 2009, at 1A.

# Florida Circuit Court Validates Funds for Everglades Land Purchase

*South Fla. Water Mgmt. Dist. v. State of Florida*, No. 50-2008-CA-031975 (Fla. 15th Cir. Ct. Aug. 26, 2009).

*Michael McCauley, 2011 J.D. Candidate, University of Mississippi School of Law*

Florida Crystals and the Miccosukee Indians challenged the South Florida Water Management District's plan to issue \$2.2 billion in bonds to finance an 188,000-acre land acquisition for Everglades restoration. The Florida Circuit Court partially validated the plan, allowing \$650 million to purchase 73,000 acres and authorizing a three-year option to purchasing the remaining land.

## Background

The South Florida Water Management District (District) is a regional governmental agency created pursuant to the Florida Water Resources Act of 1972. The District is responsible for restoring and cleaning up the Everglades ecosystem through regional flood control, water supply and water quality protection, and ecosystem restoration management.<sup>1</sup> In June 2008, the District's Governing Board adopted Resolution No. 2008-643 to begin negotiations for an agreement to acquire agricultural land owned by U.S. Sugar Corporation. By a 4-3 vote, the Governing Board created the historic River of Grass Acquisition Project and sought to purchase 188,000 acres for storage and treatment for Everglades restoration. The Governing Board arranged a master lease-purchase program with U.S. Sugar and authorized the issuance of Certificates of Participation bonds in order to raise the proposed \$2.2 billion for the purchase. The plan included a provision to lease the land back to U.S. Sugar over the next seven years to fund the bonds.

Florida Crystals, a rival of U.S. Sugar, and the Miccosukee Indians (collectively, Florida Crystals) petitioned for an Administrative Hearing to challenge the agency action. The petition claimed that the District acted outside its bounds of authority and that the deal constituted an unfair subsidy for U.S. Sugar, was an irresponsible use of taxpayer dollars, and would delay other planned Everglades restoration efforts. Numerous environmental organizations supported the plan recog-

nizing the flexibility such a large, contiguous tract of land would allow for long-term, regional planning. The Florida Audubon Society filed a motion of intervention stating it publicly supported the plan, calling opposition "short-sighted private interests aimed at thwarting the District's efforts to restore the Everglades."<sup>2</sup>

## Authority to Issue the Bonds

The court's scope of review is narrowly limited to "(1) determine if a public body has the authority to issue the subject bonds; (2) determine if the purpose of the obligation is legal; and (3) ensure that the authorization of the obligation complies with the requirements of law."<sup>3</sup> Regarding the first issue, the court acknowledged prior grants of authority to the District for bond issuance. The court cited Florida statutes that define "bonds" to include Certificates of Participation (COPs), and "revenue bonds" to mean "bonds of a water management district to the payment of which the full faith and credit and power to levy ad valorem taxes are not pledged."<sup>4</sup>

## Valid Purpose

The court held that the District had only partially met the requirement of valid legal purpose. Valid public purpose was demonstrated in regards to the initial 73,000 acres the District sought to purchase. The court dismissed Florida Crystals' argument that plans to use the land for water storage and treatment were not spe-

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*Additionally, the land would be valuable for future land swaps.*

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cific or valid. Pleadings and testimony showed that the land would be used for water storage and treatment and would fall within the current Comprehensive Everglades Restoration Projects basins. Additionally, the land would be valuable for future land swaps. The court noted that detailed plans are not required to find a valid



public purpose and that sufficient evidence was presented as to plans for the initial purchase of 73,000 acres of land.<sup>5</sup>

The court held the District failed in this respect, however, regarding the remaining 107,000 acres. While detailed plans are not required, there must be a minimal level of specificity.<sup>6</sup> Since virtually no evidence was presented, the court could find no valid public purpose for this land. However, the court authorized the District to purchase a three-year, \$50 million option for the remaining 107,000 acres.

Although the court appeared sympathetic to Florida Crystals' argument attacking the economic feasibility of the project, the court reminded parties that the scope of review is narrowly limited to the factors discussed above. Additionally, the court dismissed allegations that the project was simply a subsidy to U.S. Sugar as Florida Crystals submitted no evidence to back up the claim. The court noted that any private benefits to U.S. Sugar were incidental to the primary purpose of restoring the Everglades.

### Requirements of Law

Florida Crystals also challenged whether the bond issuance would comply with Florida law. The first issue concerned whether legislative approval was required for the COPs. The court, citing both statute and case law, held that legislative approval is only required for revenue bonds issued by "the state or its agencies." Florida Crystals submitted no evidence that the District is a state agency for tax purposes. The court also noted that case law has held that a water management district was a special district under Article VII, § 9(a) of the Florida Constitution, and "was thereby authorized to levy ad valorem taxes."<sup>7</sup>

Florida Crystals then argued the Trust Indenture was insufficient as Florida law requires that a trustee certify the proper expenditure of the COPs proceeds.<sup>8</sup> However, the court found it sufficient that the proposal's Master Trust Agreement binds the Trustee to act as fiduciary and to hold and distribute the trust proceeds for the use and benefit of the Certificate.<sup>9</sup> Florida law did not require that a trust agreement provide for written certification and that by simply determining to use Deutsche Bank as the Trustee Holders met the plain meaning of Florida law.

The court also rejected Florida Crystals' argument against validation because the District has not complied with the "truth-in-borrowing" requirements of Florida law. As many of the details required

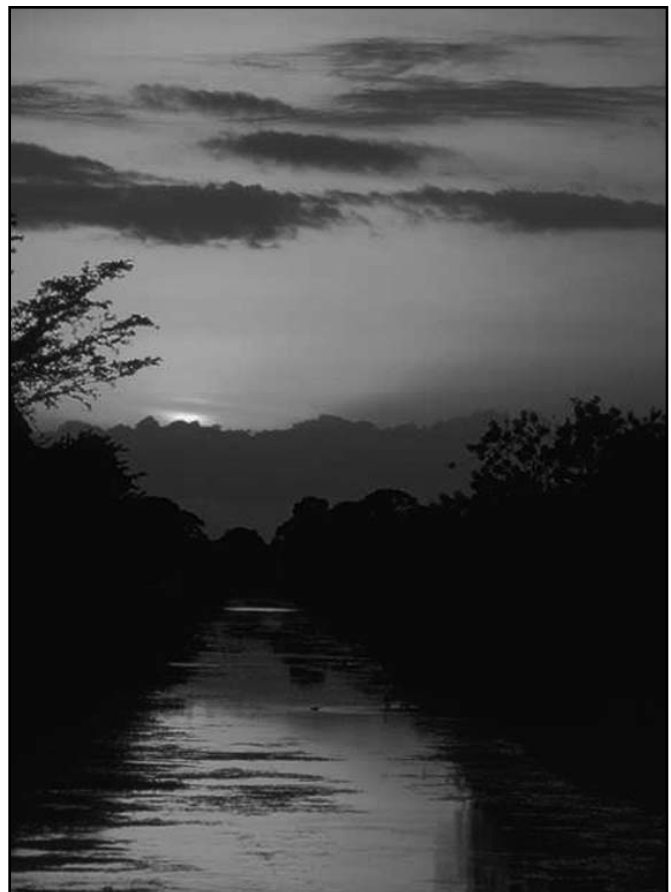
for the application were not yet known, the court found that validation was not dependent on whether such documents were completed for the COP. Finally, the court held that the Florida Constitution requirement for referendum did not apply to use of ad valorem tax revenues. The court relied on *Strand v. Escambia County*, in which the court upheld the distinction between pledges of the ad valorem taxing power and use of ad valorem tax revenues.<sup>10</sup> Florida Crystals also challenged the District's authority to create the Leasing Corporation. The court dismissed this argument noting that government entities may create nonprofit corporations for the sole purpose of facilitating a COP's transaction.

### Bond Cap

Lastly, the court declined to consider Senate Bill 280, which prohibits any bond issued before January 1, 2009 to exceed 20% of the ad valorem tax revenue. Because the Governing Board acted in December 2008 and the \$650 million validated by the court does not exceed the 20% cap, the court held the bond would not be prohibited by Senate Bill 280.

*See Everglades, page 14*

*Photograph from the Everglades courtesy of ©Nova Development Corp.*



# Court Dismisses Wetlands Lawsuit Challenging Regional General Permit 20

*Turkey Creek Cmty. Initiatives v. U.S. Army Corps of Engrs*, No. 1:08cv124-LG-RHW, 2009 WL 2252882 (S.D. Miss. July 28, 2009).

*Joanna C. Abe, 2011 J.D. Candidate, University of Mississippi School of Law*  
*Niki L. Pace, J.D., LL.M.*

In late July, a U.S. District Court dismissed a lawsuit appealing issuance of Regional General Permit 20 (RGP 20) under the Clean Water Act (CWA). The U.S. Army Corps of Engineers (Corps) issued the permit on May 23, 2007 to aid rebuilding efforts following Hurricane Katrina. Without reaching the merits of the case, the court found that the citizen groups bringing the suit lacked standing because they failed to demonstrate their “concrete interests” were “imminently threatened” by RGP 20.<sup>1</sup>



Photograph courtesy of ©Nova Development Corp.

## Background

Local citizen groups Turkey Creek Community Initiatives, North Gulfport Community Land Conservancy, and Gulf Restoration Network (collectively, Gulf Restoration) initially brought suit against the Corps in August 2007 challenging the issuance of RGP 20. RGP 20 allows up to three acres of low-quality wetlands to be filled for every new residential development project in Mississippi's six lower coun-

ties. According to the Corps, RGP 20 is necessary to address affordable housing needs in coastal Mississippi which were severely impacted by Hurricane Katrina.<sup>2</sup>

General permits for dredge and fill activities, like RGP 20, may be issued on a state, regional, or nationwide scale and are authorized in limited circumstances pursuant to CWA § 404(e). The CWA confines use of general permits to situations where the activities are similar in nature and have minimal adverse effects on the environment. General permits are limited in duration to five years.<sup>3</sup>

Before issuing RGP 20, the Corps engaged in the necessary public notice and comment period. To evaluate the environmental impact of then proposed RGP 20, the Corps also performed an environmental assessment (EA) as prescribed by the National Environmental Policy Act (NEPA). After reviewing the EA, the Corps issued a “finding of no significant impact” thereby precluding the need to prepare a more detailed environmental impact statement (EIS).

Unlike individual permit applications, projects proceeding under RGP 20 do not undergo public notice and comment under the CWA and are not subject to individual environmental analysis under NEPA. Gulf Restoration alleged the Corps violated both the CWA and NEPA by issuing RGP 20 on various grounds, including the failure to perform an EIS. Denying the allegations, the Corps countered that Gulf Restoration lacked standing to bring this lawsuit. At the time of the ruling, no applications to proceed under RGP 20 had been submitted.<sup>4</sup>

## Standing

The doctrine of standing, which is the right to bring a claim, originates with Article 3 of the U.S. Constitution.<sup>5</sup> The standing requirement considers whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant invocation of federal-court jurisdiction.<sup>6</sup> To prove standing, a plaintiff must satisfy three elements: 1) the plaintiff must have suffered an injury in fact, 2) the injury must be traceable to the defendant's challenged action, and 3) the injury must be likely redressable by a favorable decision.<sup>7</sup>

Organizations must also show that interests raised are connected to the organization's purpose and resolution of the matter does not require individual member participation.<sup>8</sup>

An injury in fact must be concrete and particularized and actual or imminent.<sup>9</sup> In this instance, the court acknowledged "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.'"<sup>10</sup>

The Corps argued that Gulf Restoration suffered no injury in fact and thus lacked standing to bring suit.<sup>11</sup> In reaching its decision, the court considered Gulf Restoration's assertions of both substantive and procedural injuries to determine if an injury in fact occurred.

### Substantive Injury

Gulf Restoration claimed that three of its members have interests in the areas subject to RGP 20 and that application of RGP 20 would impact their interests by causing "increased flooding, water pollution, and loss of habitat, vegetation, and animals."<sup>12</sup> However, Gulf Restoration failed to identify a single project proceeding under RGP 20.

Rejecting these grounds for standing, the court noted that no case or controversy was before the court without a particular application of RGP 20. To establish injury in fact, Gulf Restoration needed an imminent threat to its interests rather than relying upon an unsubstantiated future event.<sup>13</sup>

### Procedural Injury

For standing purposes, a plaintiff can demonstrate a procedural injury where he has "been accorded a procedural right to protect his concrete interests."<sup>14</sup> Gulf Restoration asserted three procedural injuries: "the failure to conduct an EIS, past failure to conduct a public hearing on RGP 20, and future denial of public notice and comment on any potential construction project under RGP 20."<sup>15</sup> The court recognized that agency failure to conduct an EIS creates an implicit procedural injury in fact for standing purposes where the plaintiff has a sufficient geographical nexus to the challenged project.<sup>16</sup>

However, the court went on to reject Gulf Restoration's assertions of procedural injury, again noting the group's failure to cite

any specific application of RGP 20 which threatened its interests. In essence, absent an actual application of RGP 20 that concretely affected Gulf Restoration's interests, Gulf Restoration could not satisfy standing requirements.

### Conclusion

Without a pending project, Gulf Restoration was limited to alleging future harms which proved insufficient to demonstrate a concrete and imminent injury in fact. Leaving the door open for future challenges, the court expressed "no opinion on the merits of any potential claim or challenge that may emerge from an application granted under the authority of RGP 20."<sup>17</sup>

### Endnotes

1. Turkey Creek Cmty. Initiatives v. U.S. Army Corps of Eng'rs, No. 1:08cv124, 2009 WL 2252882, at \*7 (S.D. Miss. July 28, 2009).
2. *Id.* at \*1.
3. 33 U.S.C. § 1344(e)(1); *see also* 33 C.F.R. § 325.
4. *Turkey Creek*, 2009 WL 2242882, at \*1.
5. U.S. Const. art. 3, § 2, cl. 1.
6. *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1149 (2009).
7. *Turkey Creek*, 2009 WL 2242882, at \*3.
8. *Id.*
9. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).
10. *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000)).
11. *Id.* at \*3.
12. *Id.* at \*4.
13. *Id.*
14. *Summers*, 129 S.Ct. at 1151.
15. *Turkey Creek*, 2009 WL 2252882, at \*5.
16. *Id.*
17. *Id.* at \*7.

*Photograph of local children helping with Turkey Creek restoration project courtesy of the Turkey Creek Initiatives.*



# Mississippi River's Flow Potential Source of Renewable Energy

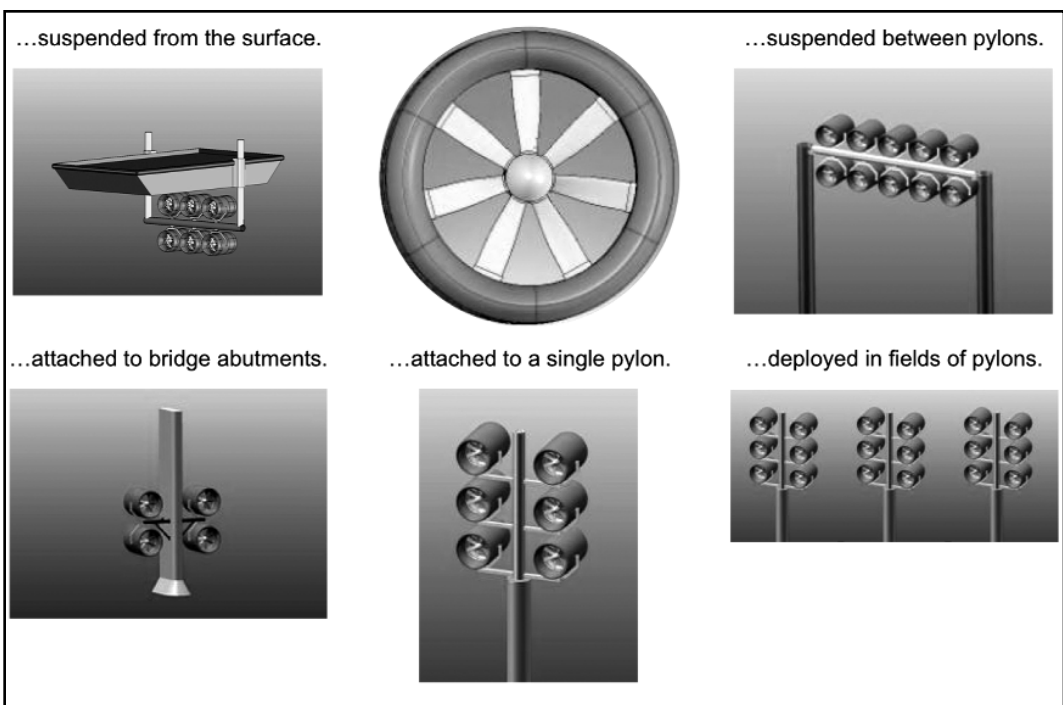
*Niki L. Pace, J.D., LL.M.*

Could electricity generated from the flow of the Mississippi River one day power your home? According to certain renewable energy developers, the answer is yes. Several companies, including Free Flow Power (FFP) and Hydro Green Energy (Hydro Green), have obtained preliminary permits from the Federal Energy Regulatory Commission (FERC) for numerous sites along the Mississippi River where they plan to test new technologies that generate electricity from the river current.<sup>1</sup>

## Background

Concerns over rising CO<sub>2</sub> emissions have garnered increased national attention and prompted greater research and development of clean renewable energy sources.<sup>2</sup> Already many states have implemented renewable portfolio standards aimed at reducing CO<sub>2</sub> emissions by requiring utilities to purchase a certain percentage of electricity from renewable energy sources.<sup>3</sup> To stimulate development, the federal government has increased spending, announcing more than \$3 billion in funds for renewable energy projects.<sup>4</sup>

*Graphic of turbine arrays courtesy of Free Flow Power.*



Developers, anxious to take advantage of these incentives, see the Mississippi River as a potentially unlimited supply of renewable energy. According to Jon Guidroz of FFP, the Mississippi River “is one of the largest available sources of river energy in North America.”<sup>5</sup> River energy is a type of hydrokinetic energy (referring to wave, current, and tidal energy from oceans, rivers, and lakes).<sup>6</sup> Capturing hydrokinetic energy for electricity generation is not a new idea, but has only recently become commercially viable.<sup>7</sup> The most prevalent in-stream technology utilizes turbines that function much like conventional windmills by using the river current to turn the blades. Attached generators capture energy from the river current which is subsequently transmitted to the power grid.<sup>8</sup>

Hydrokinetic in-stream technology offers many benefits in addition to providing a non-carbon based renewable source of energy. Unlike traditional hydropower facilities requiring dams, these in-stream devices “rely on the kinetic energy generated by the water’s motion”<sup>9</sup> making them more adaptable to a bustling river corridor like the Mississippi. Other benefits include close proximity to consumption (unlike many

wind and solar facilities located in rural areas); the generation of green jobs, a rapidly expanding sector; and minimal aesthetic impacts.

FFP, the largest company, has secured preliminary permits for at least fifty-five sites along the Mississippi River between St. Louis and southern Louisiana. At each site, FFP plans to install clusters of turbines creating the underwater equivalent of a wind

farm.<sup>10</sup> FFP hopes such large scale testing will enable the company to mass-produce its turbines.

Taking a more cautious approach, Hydro Green has installed a test turbine at a U.S. Army Corps of Engineers dam in Hastings, Minnesota where it studies the turbine's impacts on fish, water quality, birds, and other aquatic animals. Hydro Green has permits for sites in Vidalia, Louisiana and Vicksburg, Mississippi and anticipates testing turbines at these sites next year.<sup>11</sup>

### FERC Regulation

The Federal Power Act (FPA) grants FERC regulatory and licensing authority over traditional hydropower projects located on domestic navigable waters.<sup>12</sup> FERC has interpreted this authority as extending to non-traditional hydropower projects like hydrokinetic projects.<sup>13</sup> Section 4(f) of the FPA authorizes FERC to issue preliminary permits to prospective hydropower (and hydrokinetic) license applicants.<sup>14</sup> A preliminary permit enables the permit holder to investigate the feasibility of a project and also preserves the permit holder's right of first priority when seeking to license the studied project. The permit is nontransferable and grants no land-disturbing property rights.<sup>15</sup>

To address concerns of site-banking (reserving potential sites without current intentions to develop a project), FERC evaluates preliminary permit applications for hydrokinetic projects under the "strict scrutiny" standard. "Strict scrutiny" requires reviewing applications "with a view toward limiting the boundaries of the permits, to prevent site-banking, and to promote competition."<sup>16</sup> To meet this standard, FERC carefully examines semi-annual reports to ensure that permit holders are actively pursuing the project. Where progress is insufficient, FERC may cancel the permit. Under "strict scrutiny," FERC may also mandate additional permit conditions such as "reports on public outreach and agency consultation, development of study plans, and deadlines for filing a Notice of Intent to file a license application (NOI) and a Pre-application Document (PAD)."<sup>17</sup> Obtaining a permit does not guarantee a license will be granted.

Pursuant to the preliminary permits, developers like FFP and Hydro Green have three years to conduct a feasibility analysis and comply with any additional permit conditions. At a minimum, these conditions generally include filing a NOI and PAD within one year of permit issuance. The PAD must include 1) a



*Photograph of Mississippi River courtesy of Lieut. Commander Mark Moran, NOAA Corps, NMAO/AOC.*

timeline for consultation with "federal, state, and local agencies, tribes, non-governmental organizations, and any other interested entities;" and 2) a preliminary list of issues and related necessary studies.<sup>18</sup>

### Areas of Concern

Because the projects are merely in the testing phase, many uncertainties remain including navigational and environmental concerns. For instance, shippers worry that underwater turbines pose navigational hazards to busy river traffic. Specifically, tugboat owners have voiced concerns about what will happen when low water conditions force the barges into the same pockets of deep water where the turbines will be located. Effects on levee erosion and river currents are also unknown at this time.<sup>19</sup>

Environmental concerns range from fish mortality to loss of wetlands. For instance, in a preliminary permit issued to FFP in 2009, the U.S. Department of Interior expressed the need for additional information regarding potential environmental impacts of the project including "impacts on fish, wildlife, and vegetation from introducing a structure in the water column, turbine-related fish mortality, and determination of effects of the project on any threatened and endangered species." The boundaries of that particular project include critical habitat for the threatened Louisiana black bear and other protected species as well as wetlands areas.<sup>20</sup>

Ultimately, as a precursor to licensing, developers must resolve these issues. For instance, FERC may not license the project before the Corps determines that the project will not affect navigation along the waterway.<sup>21</sup> Additionally, activities involving wetlands

trigger the Corps' regulatory authority under § 404 of the Clean Water Act.<sup>22</sup> Other areas of regulation may include water quality certification under § 401 of the CWA; consultation with U.S. Fish and Wildlife under the Endangered Species Act; and state regulation of water bottom leasing.

### Conclusion

This new technology represents an exciting step forward in the field of renewable energy, particularly in the Southeast which has limited potential for wind and solar development. While the challenges may seem daunting, developers are optimistic that with adequate testing and study these projects can move forward.☛

### Endnotes

1. Rebecca Mowbray, *Going with the Flow; Energy Upstarts are Planning to Dive in with Their Turbines to Generate Clean Power from Louisiana Waterways*, TIMES-PICAYUNE (New Orleans), May 10, 2009, at Money 1.
2. Energy Independence and Security Act of 2007, 42 U.S.C. § 17211 (2007) (authorizing a research and development program focused on hydrokinetic renewable energy technologies).
3. See Mowbray, *supra* note 1.
4. Press Release, U.S. Dept. of Energy, Treasury, Energy Departments Announce More than \$3 Billion in Recovery Act Funds for Renewable Energy Projects (July 9, 2009) (on file with author).
5. Zach Kupperman, Recent Development, *The Federal Energy Regulatory Commission Issues Preliminary Permits for Hydrokinetic Projects on the Mississippi River*, 22 TUL. ENVTL. L.J. 461, 486 (2009).
6. 42 U.S.C. § 17211 (2007). See also Jon Wellinghoff, James Pederson & David L. Morenoff, *Facilitating Hydrokinetic Energy Development Through Regulatory Innovation*, 29 ENERGY L.J. 397, 398 (2008).
7. Michael B. Walsh, Comment, *A Rising Tide in Renewable Energy: The Future of Tidal In-Stream Energy Conversion*, 19 VILL. ENVTL. L.J. 193, 195 (2008).
8. *Id.* at 197.
9. *Id.* at 196.
10. Mowbray, *supra* note 1. See also Kupperman, *supra* note 5, at 487-88.
11. *Id.*
12. See 16 U.S.C. § 817(b) (2000) (granting regulatory authority to FERC).
13. AquaEnergy Group, LTD, 102 F.E.R.C. ¶ 61,242 (2003) (finding that offshore buoy used to generate power was a "powerhouse" for purposes of establishing jurisdiction under FPA). See also Walsh, *supra* note 7, at 207-210.
14. 16 U.S.C. § 797(f) (2000).
15. Notice of Inquiry and Interim Statement of Policy, *Preliminary Permits for Wave, Current, and Instream New Technology Hydropower Projects*, 72 Fed. Reg. 9,281 (2007). (FERC has taken no action on the NOI to date).
16. Reedsport OPT Wave Park, LLC, 118 F.E.R.C. ¶ 61,118, at P 4 (2007).
17. Free Flow Power, LLC, 127 F.E.R.C. ¶ 62,227 at P 2-3 (2009). See also Kupperman, *supra* note 5, at 489-90.
18. 127 F.E.R.C. ¶ 62,227 at P 3.
19. Rebecca Mowbray, *River Turbine plan makes shippers wary; But hydropower firm calls safety top priority*, TIMES-PICAYUNE (New Orleans), June 7, 2009, at Money 1.
20. Free Flow Power, LLC, 127 F.E.R.C. ¶ 62,227 at P 1.
21. 33 C.F.R. § 221.1(e)(2) (2009).
22. 33 U.S.C. § 1344 (2009).

*Everglades, from page 9*

### Conclusion

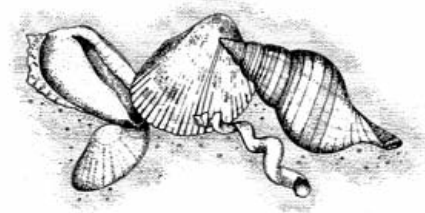
With the court validating only a portion of the proposed bond, both sides attempted to claim victory after the ruling. Florida Crystals and the Miccosukee Indians noted that the judge reduced the \$2.2 billion request by over two-thirds. Alternatively, U.S. Sugar and environmental groups welcomed the decision as well, because it allows the initial purchase of land to move forward. Additionally, the ruling created an option for the 107,000 remaining acres once specific plans are outlined. While the court acknowledged that economic feasibility of the project was outside of its judicial scope, it questioned in dicta the prudence in such current economic climate and noted the estimated cost of eight billion for the total project. However, the legal battle over this ambitious project is not yet over as the Miccosukee Indians recently filed an appeal.☛

### Endnotes

1. Fla. Stat. § 373.016(3) (2008).
2. Notice of Intervention by Audubon at 2, South Florida Water Mgmt. Dist. v. State of Florida, No. 50-2008-CA-031975 (Fla. 15th Cir. Ct. Aug. 26, 2009).
3. Strand v. Escambia County, 992 So. 2d 150, 154 (Fla. 2008).
4. Fla. Stat. § 373.584(4) (2008).
5. *Strand*, 992 So. 2d at 156.
6. South Fla. Water Mgmt. Dist. v. State of Florida, No. 50-2008-CA-031975 at \*22 (Fla. 15th Cir. Ct. Aug. 26, 2009).
7. Deseret Ranches of Fla., Inc. v. St. Johns River Water Mgmt. Dist., 406 So. 2d 1132, 1139 (Fla. Dist. Ct. App. 1981).
8. *South Fla. Water Mgmt. Dist.*, No. 50-2008-CA-031975 at \*27.
9. *Id.*
10. *Strand*, 992 So. 2d at 157-59.

# Interesting Items

## Around the Gulf...



In October, the Mississippi Supreme Court ruled in a controversial “wind vs. water” homeowners’ insurance dispute. The United Services Automobile Association Insurance Agency (USAA) had denied the Corban family coverage for their property losses following Hurricane Katrina, claiming that the damage to their property was the result of flooding, a peril excluded from their insurance policy. The Corbans filed suit, arguing that the policy’s water damage exclusion and its “anticoncurrent clause,” which barred damage caused by wind and water in combination, were ambiguous. A circuit court judge held that the storm surge was, in fact, excluded from the policy. In a 36-page unanimous ruling authored by Justice Michael Randolph, the court held that insurance companies must cover damage from hurricane winds, even if the home is later inundated by storm surge. The Corbans must now prove to a jury that the damage was caused by wind, not water. *Corban v. United Servs. Auto. Ass’n*, 2009 Miss. LEXIS 481 (Miss. Oct. 8, 2009).

On behalf of the Mississippi Levee Board, the Pacific Legal Foundation filed suit against the Environmental Protection Agency (EPA) in August, challenging EPA’s exercise of veto authority over the Yazoo Backwater Project. The Yazoo Project is a U.S. Army Corps of Engineers (Corps) flood control project located between the Mississippi and Yazoo Rivers. After weighing the environmental impacts of the project, EPA determined the project would adversely impact 67,000 acres of wetlands resulting in unacceptable harm to local wildlife and fisheries. The Clean Water Act (CWA) § 404(c) authorizes the EPA to prohibit discharges that will have unacceptable adverse effects on fisheries and wildlife, commonly known as EPA veto authority.



Photograph of the Yazoo River courtesy of USACE.

Accordingly, EPA vetoed the project in August 2008 maintaining that the improved flood control could be accomplished by less environmentally harmful methods. In the lawsuit, the Levee Board alleges the project is exempt from EPA veto pursuant to CWA § 404(r) governing congressionally authorized federal projects. Central to the dispute is whether Congress reviewed the environmental impact statement prior to authorizing or funding the project. Look for detailed coverage of this case in future *Water Log* editions. *Board of Miss. Levee Comm’rs v. U.S. EPA*, No. 4:09-cv-081 (N.D. Miss.).



Photograph of Sheahan Pumping Station courtesy of Memphis Light, Gas, and Water Division.

In follow up to previous coverage of *Hood v. Memphis*, Mississippi has appealed the Fifth Circuit’s ruling to the U.S. Supreme Court maintaining that Tennessee is not a necessary party to the lawsuit and that the Fifth Circuit erroneously determined that the groundwater was subject to equitable apportionment. In addition, Mississippi has conditionally joined the State of Tennessee in its alternate motion to file an original action with the U.S. Supreme Court seeking adjudication of the dispute. Mississippi contests Memphis’s withdrawals from the Memphis Sands Aquifer, located below both states and jointly used as water supply. In June, the Fifth Circuit concluded that resolution of the dispute necessitated equitable apportionment of the interstate aquifer between Mississippi and

Tennessee; the court dismissed the suit for failure to join Tennessee as a necessary party. The Supreme Court has original jurisdiction over interstate disputes. To date, the Supreme Court has not determined if it will hear the case. If it does, this will be the first time the Supreme Court considers whether aquifers are subject to the equitable apportionment doctrine. *Mississippi v. City of Memphis Tenn.*, No. 220139.☛

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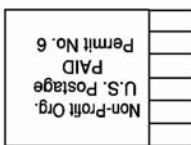
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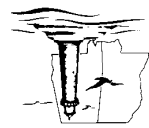
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