

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

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Environmental Compliance Hinders Florida Golf Course Development

National Wildlife Federation v. Souza, 2009 U.S. Dist. LEXIS 99674 (S.D. Fla. Oct. 23, 2009).

*Joanna B. Wymyslo, J.D., LL.M.*¹

After a decade-long conflict over the construction of a luxury golf course community in the Western Everglades, a Florida district court revoked the project permit and halted development due to violations of the Administrative Procedure Act, the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA).² In overturning the permit, the court declared the biological opinion prepared by the U.S. Fish and Wildlife Service (FWS) invalid, declared the environmental assessment (EA) prepared by the



Photograph of two wood storks courtesy of the National Biological Information Infrastructure.

U.S. Army Corps of Engineers (Corps) invalid, and remanded both to the respective agencies.³ In remanding the EA, the court clarified the requirements for cumulative impacts analysis under NEPA.

Background

The controversial development, known as Mirasol, required the destruction of 645 acres of wetlands to accommodate 36 holes of golf and 799 homes.⁴ The involved wetlands are habitat to endangered wood storks. Mirasol sought a Section 404 Clean Water Act permit for dredge and fill activities in the wetlands. The Corps granted Mirasol's 404(b) permit and issued similar permits for two adjacent developments, thereby authorizing the destruction of an additional 500 acres of wetlands.⁵ The National Wildlife Federation, the Conservancy of Southwest Florida, Collier County Audubon Society, Florida Wildlife Federation, and National Audubon Society (collectively National Wildlife Federation) filed a lawsuit against the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, and the U.S. Department of Interior for issuing the permits authorizing Mirasol's development. The property owners (permit recipients) intervened. The National Wildlife Federation alleged that the federal agencies violated the ESA because they failed, due to inadequacies in the biological opinion, to ensure that the project would not jeopardize the wood stork.⁶ The National

Wildlife Federation also asserted that the Corps violated NEPA in failing to prepare an environmental impact statement for the project.⁷

The ESA Violation

The court concluded that the FWS's biological opinion (BiOp) was arbitrary and capricious and therefore remanded it to the agency for reconsideration. The BiOp failed to consider the impacts of other nearby federal projects when it analyzed the environmental baseline, and therefore did not properly assess the project's impacts in combination with impacts constituting the baseline.⁸ Additionally, the court found that the FWS inexplicably relied on a flawed application of fish prey density data⁹ and aspects of the BiOp premised upon those calculations were therefore arbitrary and capricious. These included the measures used to determine mitigation and analyze cumulative effects of wetland loss.¹⁰

The NEPA Violation

Despite the FWS' satisfaction of several NEPA requirements, the court remanded the Mirasol environmental assessment (EA) to the Corps because it failed to take a "hard look" at the cumulative impacts of the project and nearby developments.¹¹ Cumulative effects analyses have presented an emerging issue in environmental litigation as questions have remained unanswered regarding what is



Photograph of Florida wetlands courtesy of Waurene Roberson.

required to satisfy NEPA. The purpose of an EA is to determine whether to prepare an environmental impact statement based on the significance of the effect on the quality of the human environment.¹² Pursuant to NEPA regulations, a project's effects are

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in conjunction
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significant if "it is reasonable to anticipate a cumulatively significant impact on the environment."¹³ A cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions."¹⁴

It is often extremely challenging for agencies to conduct cumulative impacts analyses with any certainty given the difficulty of predicting the occurrence of future actions, as well as examining the impacts of those future actions in conjunction with the action at issue. This has caused some confusion as to if and how agencies should address cumulative impacts in NEPA documents. In *Souza*, the court noted that "[n]either the Defendants nor the Intervenor were able to state whether an analysis of the cumulative impacts was required in the environmental assessment under the law. Defense counsel specifically stated that he didn't know whether the environmental assessment had to include such a discussion."¹⁵ The Corps had already permitted and prepared EAs for two adjacent development projects.¹⁶ In doing so, the Corps ensured the occurrence of those future actions and analyzed the relevant future effects. However, rather than analyze the impacts of those developments in conjunction with the Mirasol project, the Corps simply placed the other two EAs in the record and argued that cited excerpts from those EAs were sufficient to constitute the cumulative impacts analysis.¹⁷

In rejecting the sufficiency of the Corps' analysis, the court clarified the requirement and scope of the cumulative impacts analysis.¹⁸ It specified that in taking the requisite "hard look" at the cumulative impacts of the project, the Corps must consider the impacts of nearby developments *in conjunction* with the project at issue to determine whether an environmental impact statement is required.¹⁹

Conclusion

Though litigation is likely to continue in this case, the potential implications for cumulative impacts analysis in EAs are significant for future NEPA application. Now, at least in Florida, even if individual projects have only insignificant impacts, the combination of several projects in one area must be assessed to determine whether significant environmental damage will result. Requiring the consideration of nearby impacts in conjunction with proposed projects provides an important step toward adaptive management generally where agencies can then monitor projected cumulative effects for accuracy and address the efficacy of mitigation measures. ~

Endnotes:

1. Joanna Wymyslo holds a J.D. from Florida Coastal School of Law and a LL.M. in environmental and natural resources law from Lewis & Clark Law School. She currently practices law in Jacksonville, Florida.
2. *National Wildlife Federation v. Souza*, 2009 U.S. Dist. LEXIS 99674 (S.D. Fla. October 23, 2009).
3. *Id.* at *3.
4. *Id.* at *4; Eric Staats, *Judge revokes permit for Mirasol development*, NAPLESNEWS.COM, Oct. 26, 2009, <http://www.naplesnews.com/news/2009/oct/26/judge-revokes-permit-mirasol-development/>.
5. Press Release, Conservancy of Southwest Florida, Victory for the Environment (October 26, 2009) (*available at* <http://www.conservancy.org/Document.Doc?id=257>).
6. *Souza* at *10-*13.
7. *Id.* at *19.
8. *Id.* at *19-*22.
9. *Id.* at *30-*36.
10. *Id.* at *36-*42.
11. *Id.* at *84.
12. *Id.* at *85 (citing 42 U.S.C. § 4332(2)(C)).
13. *Id.* at *85 (citing 40 C.F.R. § 1508.27(b)(7)).
14. *Id.* at *85-*86 (citing 40 C.F.R. § 1508.7)).
15. *Id.* at *87.
16. *Id.* at *86.
17. *Id.* at *87-*89.
18. *Id.* at *84-*89 n.27.
19. *Id.* (emphasis added).

U.S. Supreme Court Rejects Mississippi Water Suit Against Memphis

Mississippi v. City of Memphis, Tenn., — S.Ct. —, 2010 WL 250602 (Jan. 25, 2010).

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

Five years after filing its first complaint, Mississippi's lawsuit against Memphis over withdrawals from the Memphis Sands Aquifer may have finally reached the end of the road. In late January, the U.S. Supreme Court denied Mississippi's petition for writ of certiorari¹ in the ongoing dispute between Mississippi and Memphis over water withdrawals from the aquifer. The Supreme Court also denied Mississippi's alternate petition to file an original action with the Court for resolution of the interstate dispute.

Background

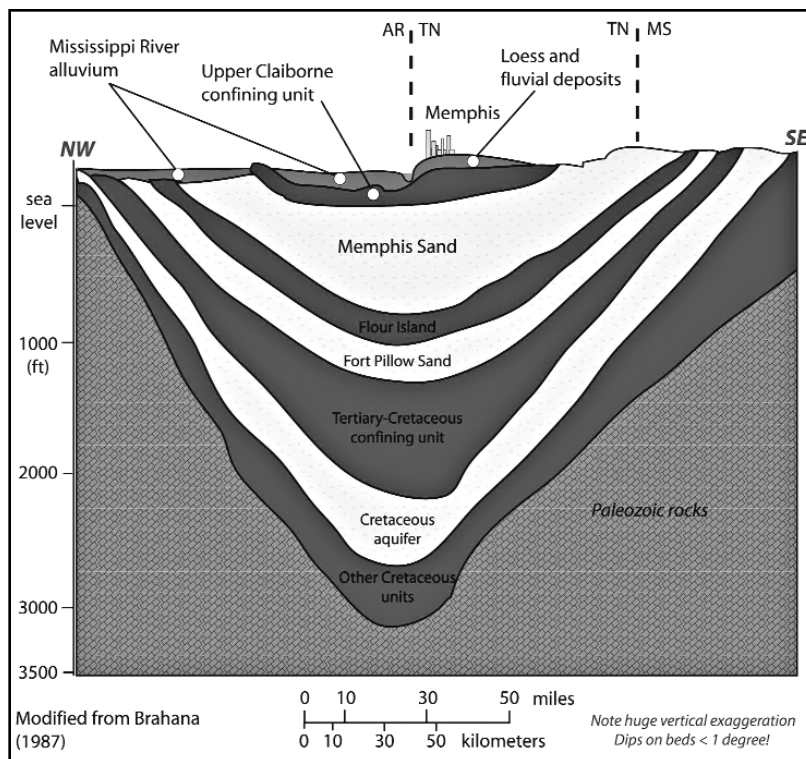
As previously covered by *Water Log*,² Mississippi sued the City of Memphis and its utility company, Memphis Light, Gas and Water Division, over withdrawals from an aquifer underlying Mississippi, Tennessee, and Arkansas. Mississippi claimed that

Memphis withdrew water that belonged to Mississippi and sought damages.

Agreeing with the lower court, the Fifth Circuit determined that Mississippi's claims required an equitable apportionment of water from the aquifer between the appropriate states. The Fifth Circuit affirmed the lower court's dismissal of the suit for failure to join indispensable parties. Specifically, the court held that resolution of the matter necessitated that Tennessee be joined as a party in the lawsuit. The Fifth Circuit, therefore, lacked subject-matter jurisdiction because the U.S. Supreme Court has original jurisdiction over disputes between states.³

On September 2, 2009, Mississippi appealed the Fifth Circuit opinion to the U.S. Supreme Court.⁴ In the event that the Supreme Court denied Mississippi's request for appeal, Mississippi also filed an alternative motion for leave to bring an original action before the Supreme Court in this matter.⁵ Without issuing an opinion, the Supreme Court denied both requests.

Graphic courtesy of Memphis State University.



Appeal of Fifth Circuit Decision

To distinguish between Mississippi's two requests, the appeal of the Fifth Circuit decision requested the Supreme Court to reconsider the holding of the lower court. As stated above, the lower court found that any resolution of the case would require an equitable apportionment of the aquifer and thus the joinder of Tennessee as a necessary party. In its request for appeal, Mississippi maintained, instead, that equitable apportionment was inapplicable because the groundwater in question was the sovereign property of Mississippi.⁶

The Supreme Court has never explicitly ruled that the doctrine of equitable apportionment governs transboundary aquifers like the Memphis Sands Aquifer. However, as noted by the Fifth Circuit, existing caselaw supports treating

aquifers as “any other part of the interstate water supply.”⁷ One inference that can be drawn from the Supreme Court’s denial to reconsider this issue on appeal is that the Court considers this area of law settled, agreeing with the conclusions of the Fifth Circuit.

Original Action

The Court also denied Mississippi’s motion for leave to file an original complaint in this matter.⁸ Although no opinion was issued, the Court did cite two prior decisions dealing with interstate water disputes: *Virginia v. Maryland* and *Colorado v. New Mexico*. Both cases deal with equitable apportionment lending further support to the inference that the Court considers this a settled area of law.

In *Virginia v. Maryland*, Maryland sought to regulate Virginia’s exercise of its riparian rights on the Virginia shore of the Potomac River.⁹ An existing compact between the states regulated use and control of the Potomac River. In resolving the dispute, the Court noted that “[f]ederal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other’s interest in the river.”¹⁰ In denying Mississippi’s motion, the Court specifically references this principle from *Virginia v. Maryland*, suggesting that equitable apportionment does in fact govern a dispute over a transboundary aquifer.

The Court’s reference to *Colorado v. New Mexico* adds even greater support to this conclusion. In *Colorado v. New Mexico*, Colorado sought to divert 4,000 acre-feet per year from an interstate river for future use. New Mexico challenged this decision. The Court held that the principle of equitable apportionment governed the situation and required a showing of harm: “Our cases establish that a state seeking to prevent or enjoin a diversion by another state bears the burden of proving that the diversion will cause it ‘real or substantial injury or damage.’”¹¹ The Court went on to note that, in this instance, New Mexico bore the initial burden of proving that Colorado’s diversion would cause substantial injury to New Mexico.

In other words, Mississippi, in challenging Tennessee’s withdrawals from the aquifer, bears the burden of showing that Tennessee’s withdrawals are causing, or will cause, real or substantial harm to Mississippi. The Court’s dismissal of Mississippi’s

request for an original action suggests that the Court does not consider Mississippi’s burden met at this time.

The Supreme Court has effectively closed the door on Mississippi’s current claims over withdrawals from the aquifer.

Conclusion

The Supreme Court has effectively closed the door on Mississippi’s current claims over withdrawals from the aquifer. However, Mississippi’s request to file an original action was dismissed without prejudice. This frees Mississippi to file an original action with the Supreme Court in the future should Mississippi be able to sufficiently demonstrate injury. Current accounts suggest that Mississippi may seek to work with Tennessee and Memphis to reach a resolution of the matter without further litigation.¹²

Endnotes:

1. A writ of certiorari is used by the U.S. Supreme Court to review the cases that it wants to hear. BLACK’S LAW DICTIONARY 228 (6th ed. 1990). By petitioning the Supreme Court for a writ of certiorari, Mississippi is asking the Supreme Court to review the Fifth Circuit decision in this case.
2. Joanna C. Abe, *Fifth Circuit Dismisses Mississippi’s Groundwater Claim*, 29:2 WATER LOG 6-7 (2009).
3. Hood v. City of Memphis, Tenn., 570 F.3d 625 (2009).
4. See Petition for Writ of Certiorari, Mississippi v. City of Memphis, Tenn., 2010 WL 250602 (Jan. 25, 2010) (No. 09-289).
5. See Mississippi’s Motion for Leave to File Bill of Complaint in Original Action, Mississippi v. Memphis, No. 139 Original (2010).
6. Petition for Writ of Certiorari, *supra* note 4, at i.
7. Hood v. Memphis, 570 F.3d at 630, n. 5.
8. 559 U.S. ____ (Jan. 25, 2010), available at <http://www.supremecourtus.gov/orders/courtorders/012510zor.pdf>.
9. Virginia v. Maryland, 540 U.S. 56 (2003).
10. *Id.* at 74 n. 9.
11. Colorado v. New Mexico, 459 U.S. 176, 187, n.13 (1982).
12. Jack Elliot Jr., *Hood Weighs Options on Miss.-Tenn. Water Dispute*, SUN HERALD (Biloxi, Miss.), Jan. 27, 2010, <http://www.sunherald.com/218/story/1900727.html>.

Litigation Follows EPA's Veto of Mississippi Delta Flood Control Project

Board of Miss. Levee Comm'rs v. U.S. EPA, No. 4:09-cv-081 (N.D. Miss. filed Aug. 11, 2009).

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

In September 2008, the Environmental Protection Agency (EPA) issued its final determination to veto the Yazoo Pumps flood control project in the Mississippi delta pursuant to its 404(c) veto authority under the Clean Water Act (CWA).¹ The determination, both significant and controversial, represents only the twelfth time in the thirty-eight year history of the CWA that the EPA has exercised this veto authority.² Unsurprisingly, EPA's decision has led to litigation. The Mississippi Levee Board (Levee Board), represented by the Pacific Legal Foundation, has filed suit against the EPA alleging that EPA's exercise of the veto was illegal.³

Background

The Yazoo Pumps project (also known as the Yazoo Backwater Area project) is a U.S. Army Corps of Engineers (Corps) flood control project with a long history.⁴ Originally authorized by the 1941 Flood Control Act, the project aims to reduce backwater flooding in the Yazoo River Basin through a combination of drainage structures, pumping stations, and levees. The Yazoo Pumps are the final stage of this ongoing project. The Yazoo Pumps project is designed to address flooding concerns in a 630,000-acre area between the Mississippi and Yazoo Rivers by constructing a pumping station for use during high water events. According to the Corps, the area contains "some of

the richest wetland and aquatic resources in the Nation," including highly productive bottomland forests, migratory bird foraging grounds, and important habitat for the federally protected Louisiana black bear.⁵

EPA's Veto Determination

Section 404(c) of the CWA is commonly referred to as EPA "veto authority." It authorizes EPA to prohibit or restrict the use of any U.S. waters (including wetlands) as a disposal site for dredge and fill materials when it "determines, after notice and opportunity for public hearing, that such discharge into waters of the United States will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."⁶ This provision allows EPA some oversight of Corps' wetland permit decisions.

In this matter, EPA first raised concerns that the proposal's impacts were unacceptable after initial consultations with the Levee Board and the Corps; EPA began the formal process for exercising its 404(c) authority in early 2008.⁷ During the comment period, the U.S. Fish & Wildlife Service (FWS) agreed that the project would result in extensive and unacceptable adverse effects to fish and wildlife. FWS was also concerned that the proposal would degrade the wildlife habitat in its four National Wildlife Refuges located within the area.⁸ On September 19, 2008, EPA issued its final determination concluding that the proposal would result in unacceptable adverse effects on fishery areas and wildlife, including signifi-

Photograph of Louisiana black bear cub courtesy of the USFWS.



cantly. FWS was also concerned that the proposal would degrade the wildlife habitat in its four National Wildlife Refuges located within the area.⁸ On September 19, 2008, EPA issued its final determination concluding that the proposal would result in unacceptable adverse effects on fishery areas and wildlife, including signifi-

cant degradation of approximately 67,000 acres of wetlands. In EPA's opinion, improved flood protection can be achieved while still protecting wetlands and other natural resources.⁹

Section 404(r) & Levee Board Claims

Following EPA's veto determination, the Levee Board filed suit in August 2009. In its complaint, the Levee Board does not outright challenge the basis of EPA's decision to veto the project. Rather, the Board contends that the project is wholly exempt from EPA veto authority pursuant to section 404(r) of the CWA, thereby voiding EPA's decision.¹⁰ Section 404(r) deals with federal projects specifically authorized by Congress; it provides for exemptions of dredge and fill material discharges arising from those projects in limited circumstances. To qualify for this exemption, two requirements must be met: 1) the effects of the discharge, including consideration of section 404(b)(1) guidelines, must be included in an environmental impact statement (EIS) for the project pursuant to the National Environmental Policy Act (NEPA); and 2) the EIS must be submitted to Congress prior to the discharge and prior to the authorization of the project or the appropriation of funds for construction.¹¹

As outlined by the statute, the issues become 1) is this a federal project authorized by Congress? and 2) if so, were the two requirements of 404(r) met? Based on the current filings in the case, neither party disputes that the project is congressionally authorized. However, serious dispute exists over what constitutes an EIS in this matter and when that document was submitted to Congress. The Levee Board maintains that a 1982 document transmitted to Congress constitutes the necessary EIS; that this document was submitted to Congress in 1983; and that funds were subsequently appropriated in 1984.¹² Conversely, the EPA disagrees that the 1982 document is a final EIS which would prevent reliance on the 404(r) exemption.¹³

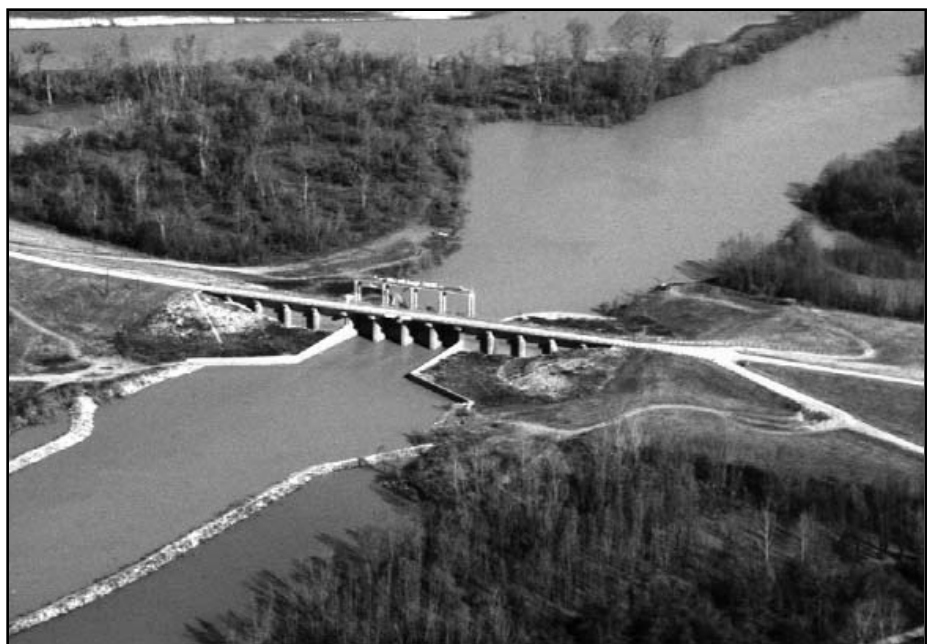
Conclusion

Since the lawsuit was initially filed, six environmental groups have intervened on behalf of the EPA, including the Mississippi Wildlife Federation and the Sierra Club. The parties held a case management conference on January 28 and will submit a scheduling order for the case in early February.[✓]

Endnotes

1. EPA, Final Determination Concerning the Proposed Yazoo Backwater Area Pumps Project in Issaquena County, MS, 73 Fed. Reg. 54,398 (Sept. 19, 2008).
2. See EPA Factsheet, at <http://www.epa.gov/wetlands/pdf/404c.pdf> (listing the twelve projects).
3. Complaint at 2, Board of Miss. Levee Comm'rs v. EPA, No. 4:09-cv-081 (N.D. Miss. filed Aug. 11, 2009).
4. See also Stephanie Showalter & Sarah Spigener, *Corps v. EPA: The Battle to Preserve the Yazoo Backwater Area*, 28:1 WATER LOG 10-11 (2008) (providing more in depth history of the project).
5. 73 Fed. Reg. 54,398.
6. 33 U.S.C. 1344(c).
7. 73 Fed. Reg. at 54,399.
8. *Id.*
9. *Id.* at 54,400.
10. Complaint, *supra* note 3, at 2.
11. 33 U.S.C. 1344(r).
12. Complaint, *supra* note 3, at 7.
13. Answer at 5, Board of Miss. Levee Comm'rs v. EPA, No. 4:09-cv-081 (N.D. Miss. filed Aug. 11, 2009).

Photograph of Yazoo River control structure courtesy of USACE, photographer Alfred Dulaney.



Mississippi Supreme Court Weighs In On the Water-Wind Debate

Corban v. United Servs. Auto. Ass'n, 20 So. 3d 601 (Miss. 2009).

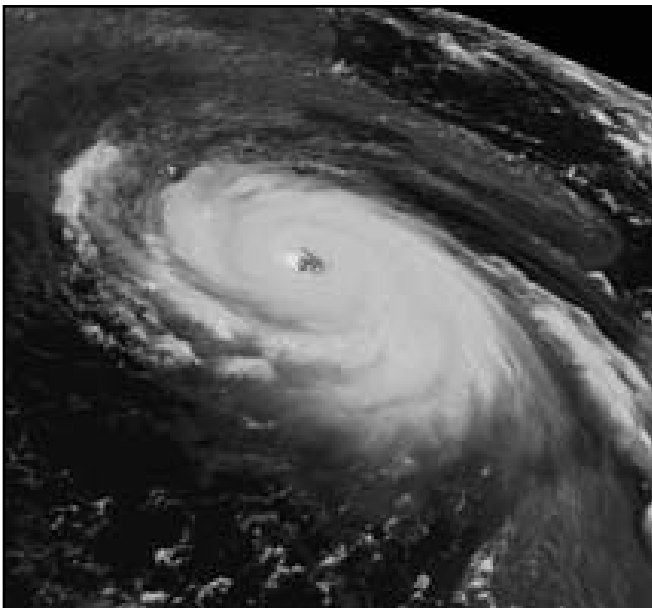
*Alexander Ignatiev, J.D.*¹

Mississippi has a long history of influential insurance coverage jurisprudence.² With the October 8, 2009 decision of the Mississippi Supreme Court in *Corban v. USAA*,³ Mississippi returned to the forefront of insurance litigation.

Background

The Corbans, who lived on East Beach Boulevard in Long Beach, a few hundred feet from the Gulf Coast, suffered extensive property damage from the storm surge of Hurricane Katrina. Their losses included their two-story home, multi-car garage, a guest cottage, gazebo, potting shed, and other structures, totaling over \$1.6 million.⁴ The Corbans were insured by USAA. USAA's engineers determined that flooding caused the majority of the loss, and that the losses clearly exceeded the flood policy coverage. USAA gave the Corbans the limits of their flood policy for both dwelling and contents, \$350,000.00, and awarded an additional \$83,903.77 under their homeowners policy, but excluded the rest of the Corbans's

Photograph of Hurricane Katrina courtesy of NOAA.



claims under the anti-concurrent cause exclusion of their HO-3 policy.⁵ The form HO-3 policy is one of six standard homeowners policy forms created by the Insurance Services Office and the American Association of Insurance Services, and is the most common type of homeowners' insurance policies issued in America.

The Corbans filed suit in the Circuit Court of Harrison County, claiming that the exclusions in the policy were ambiguous and contradictory since the policy purported to cover hurricane damage. USAA answered claiming that the Corbans's remaining damages were water damages and thus excluded under the HO-3 policy. Both parties filed motions for partial summary judgment, and the circuit court granted partial summary judgment to USAA.⁶ The Corbans filed an interlocutory appeal to the Mississippi Supreme Court, and the circuit court entered an order staying the circuit court proceeding and continuing the trial. The Mississippi Supreme Court reduced the appeal to three basic questions: 1) is storm surge damage excludable as water damage; 2) did the policy's anti-concurrent cause (ACC) clause apply to the Corbans; and 3) which party bears the burden of proof.⁷

Interpreting the Contract

The court began its analysis by returning to Mississippi's tried and true rules of contract interpretation and examined the policy on the basis of the four-corners test and the plain language of the policy. In Mississippi, in cases involving ambiguous language, insurance policies are interpreted on all their terms for the benefit of the insured, particularly when considering exclusions and limitations on coverage.⁸ The court held that the storm surge derived damage to the Corbans's property was water damage as contemplated by the policy.⁹

Concurrent Causation

Having dispensed with that issue, the court next turned to the question of concurrent causes. USAA argued that the Corbans's insurance policy excluded

any damage that was “caused directly or indirectly by [water]. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.” The court identified a key dichotomy in Mississippi law and the Corbans’s policy as the source of the problem: loss and damage are two separate things.¹⁰ Loss follows damage to the insured’s property. The Corbans’s policy excluded specific losses, not damage, and the court reasoned that each loss is unique, and that the right of the insured to indemnity vests at the time of the loss. “In the case of a loss caused by an excluded peril, that particular loss is not changed by any subsequent covered peril or event. Nor can that excluded loss become a covered loss, after it has been suffered.”¹¹ If wind and water caused losses at different times, they cannot be considered concurrent under the policy.

The court definitively stated its interpretation of the exclusion clause: “[USAA does] not insure for *loss* caused directly or indirectly by [water damage]. Such loss [from water damage] is excluded regardless of any other cause or event [wind damage] contributing concurrently or in any sequence to the loss [from water damage].”¹² The court based its reasoning on the existing ambiguity between concurrent causes and sequential causes, and the long-standing principle that ambiguities will be resolved in favor of the non-drafting insured.

Based on the court’s reading of the exclusion clause, the court held that the finder of fact had the duty to determine whether wind or water caused each loss. The court steadfastly rejected the position of Nationwide, which had filed an amicus brief in the case, that any losses that would have been caused by the storm surge anyway were properly excluded. The court agreed with U.S. District Court Judge Senter’s reasoning in *Dickinson v. Nationwide Mut. Fire Ins. Co.*, that “storm surge flooding cannot be a cause ... of damage that occurs before the storm surge flooding reaches the insured property.”¹³ The court held that the ACC clause did not bar the Corbans’s claims.

Burden of Proof

Finally, the court examined which party bore the burden of proof as to each loss. The court held that as to each loss under Coverage A and Coverage B (the all-risk provisions), the Corbans were required to prove by a preponderance of the evidence “direct, physical

loss to property described.” USAA then bears the burden to prove that the cause of each loss is excluded, i.e., flood, and USAA must indemnify the Corbans for all losses not caused or concurrently contributed to by flood. These are jury questions.¹⁴ Coverage C, which is named perils coverage, switches the burdens to the Corbans to show that wind caused the direct physical loss.¹⁵

Conclusion

The court remanded the matter to the Circuit Court of Harrison County for further proceedings, affirming the Circuit Court’s ruling that storm surge is water damage, but reversing the Circuit Court’s ruling that the Corbans’s losses were subject to the ACC clause.¹⁶ At present, *Corban* has not been cited in subsequent opinions, but commentators engaged in Mississippi insurance coverage litigation agree that it will exert a lasting influence over issues of insurance contract interpretation. ♪

Endnotes

1. Alexander Ignatiev received his J.D. from the University of Mississippi School of Law. Mr. Ignatiev is a solo-practitioner in Hattiesburg, Mississippi. The author extends thanks to Hon. Eugene Love Fair, Chancellor, 10th Chancery District of Mississippi, for his assistance in providing a copy of the slip opinion in *Robertson v. Aetna Insurance Co.*
2. See *Robertson v. Aetna Insurance Co.*, Slip Opinion (awarding the state of Mississippi over \$8 million in damages against dozens of insurance companies in 1921, on remand from the Mississippi Supreme Court, *Aetna Co. v. Robertson*, 126 Miss. 387 (1920) and 127 Miss. 440 (1920)). *Robertson v. Aetna* was one of a number of factors that led the United States Congress to pass the McCarran-Ferguson Act, which enacted the anti-trust exemption for insurance companies in America.
3. *Corban v. United Servs. Auto. Ass’n*, 20 So. 3d 601 (Miss. 2009).
4. *Id.* at 605-06.
5. *Id.* at 606.
6. *Id.* at 607.
7. *Id.* at 608.
8. *Id.* at 608-09.
9. *Id.* at 611.
10. *Id.* at 612-13.
11. *Id.* at 613.
12. *Id.* at 616.
13. *Id.* at 617 (citing *Dickinson v. Nationwide Mut. Fire Ins. Co.*, 2008 WL 1913957, at *2-4).
14. *Id.* at 619.
15. *Id.*
16. *Id.* at 619-20.

District Court Finds Liability in MRGO Lawsuit

In Re Katrina Canal Breaches Consolidated Litigation; Pertains to: Robinson C.A. No. 06-2268, 647 F. Supp. 2d 644 (E.D. La. 2009).

*Shawn Lowrey, J.D.*¹

In November, a Louisiana district court found in favor of six plaintiffs seeking damages from the U.S. Army Corps of Engineers (Corps) resulting from the Corps maintenance and operation of the Mississippi River Gulf Outlet (MRGO).² The court ruled that the United States was liable under the Federal Tort Claims Act (FTCA) for damages incurred in the aftermath of Hurricane Katrina due to failure to properly maintain the MRGO. While punitive damages under Louisiana law were declined, the court granted actual damages to the six property owners for losses caused by the flooding.

Background

Central to this litigation are two U.S. Army Corps of Engineers projects which have substantially impacted the New Orleans metro area. The first project, later known as the MRGO, began in 1943 amid World War II concerns over shipping during future hostilities and continued due to financial interest by the maritime industry. The MRGO created a shortcut from New Orleans to the Gulf of Mexico. A section of the channel known as Reach 1 ran from the Inner Harbor Navigational Canal eastward along the Gulf Intracoastal Waterway to a point near Michoud. There the route struck a southeasterly course along the south shore of Lake Borgne across Chandeleur Sound to the Gulf of Mexico. This section of the channel is Reach 2. As Reach 2 moved southward, it cut through Bayou Bienvenue at the channel's more northerly end and Bayou La Loutre at its more southerly end. The channel was to be 36 feet deep and 500 feet wide, increasing at the Gulf of Mexico to 38 feet deep and 600 feet wide. Over 60 miles in length, the MRGO drastically lowered shipping time from the Gulf of Mexico to the Mississippi River.³

The second project was the Lake Pontchartrain and Vicinity Hurricane Protection Plan (LPV) which was put into action after several severe hurricanes during the 1950s. The LPV is a series of levees built

around New Orleans area. It was based on a study by the Corps utilizing a model to determine necessary levee height and engineering needs known as the Standard Project Hurricane (SPH). The Corps created the SPH in conjunction with the U.S. Weather Bureau to "select hurricane parameter of wind speed and central pressure for defining the SPH."⁴ The LPV was to provide a degree of protection equivalent to the surge and wave action predicted to result from the SPH parameters. The analysis also took into account the Probable Maximum Hurricane (PMH) which was a stronger, although less likely event. Ultimately, the design of the project focused on SPH surge protection—the less forceful occurrence.⁵

In 1965, Hurricane Betsy, a Category 5 storm, hit New Orleans causing catastrophic flooding in the area including Chalmette and the Ninth Ward. This flooding provided an added push for the LPV; shortly thereafter the plan was put into motion. The levees crucial to the issues of the case are those built to protect New Orleans East and the Chalmette area. The levees consisted of large earthen dams to prevent flooding by high tides during hurricanes.⁶

In a detailed review of the evidence presented, the court enumerated a series of relevant facts contributing to the losses alleged by the property owners. Specifically, the court found that the construction and maintenance of the MRGO caused immense environmental destruction. The water from the Mississippi River that coursed through the MRGO caused erosion of clays known as fat clays. The fat clays sloughed and fell away when exposed to water resulting in lateral displacement and widening of the MRGO, which threatened the LPV. In addition, wave wash from large ocean going vessels exacerbated the damage by further stripping and widening the MRGO. Combined with a lack of foreshore protection, these factors combined to eat away at the protection offered by the LPV, widening the MRGO, and threatening the levees.⁷

Further compounding the matter, increased salinity, along with changes in depths of local waterways, led to a marked decrease in local vegetation between 1956 and 1976. An expert testified that vegetation generally reduces storm surge by a foot for every 2.75 miles; roots and existing vegetation also decrease soil

loss.⁸ The combined erosion resulted in land sloughing back into the river as the Corps dredged. The overall result was destruction of approximately 4,800 miles of land from 1965-2001 and a loss of land habitat of 19,559 miles. The higher width and fetch (open water length over which wind can blow) on the MRGO allowed more forceful frontside wash on the levees by Katrina which lead to their collapse and the flooding of the areas in question.⁹

In the lawsuit, property owners alleged that the Corps failed to take timely, appropriate preventative measures, primarily foreshore protection, to prevent the exponential growth of the MRGO channel from its original design width to three times that size. The property owners further contended that the Corps' failure to address the salinity introduced into the region by the MRGO resulted in increased wetland degradation. According to the property owners, these failures put into play certain factors that, when the channel was confronted with Hurricane Katrina's storm surge, created forces which resulted in the cataclysmic failure of the levees.¹⁰ In response, the Corps raised three main defenses: 1) immunity under Section 702 of the Flood Control Act of 1928; 2) immunity under the FTCA's Due Care Exception; and 3) immunity under the FTCA's Discretionary Function Exception.¹¹ After a nineteen-day bench trial, the court found that the Corps was liable to six plaintiffs for damages arising from MRGO but declined to find liability for claims arising from the LPV.

Immunity Under the Flood Control Act

Section 702(c) of the Flood Control Act of 1928 provides immunity to the federal government in the care and maintenance of levees for the prevention of flooding. The Corps argued that this provision governed its actions with regards to the MRGO and the LPV, and the Corps was therefore immune from liability. The court disagreed and distinguished the Corps' operation and management of the MRGO from the LPV. According to the court, the LPV was a purely flood control project but not the MRGO. The court also found that the maintenance and oversight failures creating liability arose from the Corps' management of the MRGO rather than the LPV. Consequently, the Corps' actions in regard to the MRGO were not protected by the immunity provisions of the Flood Control Act.¹²

The Due Care Exception

The Federal Torts Claims Act (FTCA) authorizes suits against the government for damages resulting from injury or loss of property caused by negligent or wrongful acts of any government employee acting within the scope of his employment.¹³ The Corps raised two defenses to the claims brought under the FTCA. First, the Corps argued the Due Care Exception applied. The Due Care Exception refers to the exception immunizing the government from suit with respect to claims based on the execution of a statute or regulation and requires "that the actor have exercised due care."¹⁴ To meet the requirements of the Due Care Exception, a party must demonstrate 1) whether the statute or regulation in question specifically proscribes a course of action, and 2) if mandated, whether due care was exercised.¹⁵

The Corps argued that its acts in the maintenance and operation of the MRGO were mandatory actions for which it exercised due care. Conversely, plaintiffs argued that the Corps' failure to install foreshore protection, add salt barriers, and rebuild the wetlands for levee protection demonstrates a lack of due care. While the court agreed that the Corps satisfied the requirements of due care in constructing the MRGO, the Corps failed to exercise due care with regard to maintenance of the MRGO. In the opinion of the court, the Corps' maintenance inadequacies were further compounded by: 1) its knowledge that the MRGO was expanding past its mandated size; 2) knowledge that MRGO was a threat to human life by 1967; and 3) its failure to act in light of this knowledge. The court concluded that the Due Care Exception was therefore inapplicable.¹⁶

Discretionary Function

Finally, the Corps argued that its actions fell within the scope of the discretionary function provision of the FTCA. As noted by the court, the discretionary function provision bars claims based on the performance of a discretionary function and has no requirement to exercise due care. In fact, the statute specifically dictates that immunity attaches regardless of whether the discretion is abused.¹⁷ Regarding public policy decisions, "the discretionary function exception insulates the [g]overnment from liability if the action challenged in the case involves the permissible exercise of public judgment."¹⁸

According to the Corps, failure to mitigate measures and warn Congress of the impending crisis was a matter of judgment grounded in policy and thus protected. The Corps further argued that the discretionary function should apply because any remedial measures would have taken additional funds.¹⁹ The court disagreed reasoning that because the Corps was operating and maintaining the MRGO against professional engineering and safety standards, it was not protected. Specifically, the court noted that “[p]oor engineering is not policy.”²⁰ The Corps “choose to ignore the effects of the channel; it only examined the requirement to keep the channel open regardless of its effects on the environment and the surrounding communities.”²¹

The court also considered whether the Corps failed to comply with the mandates of the National Environmental Policy Act (NEPA) which would preclude application of the discretionary function exception. NEPA requires agencies to assess the environmental impacts for all major federal actions; where the actions significantly affect the environment, environmental impact statements (EIS) must be prepared.²² Prior to NEPA’s enactment in 1969, many federal agencies claimed to have no authority to consider environmental impacts of their actions. Although the original construction of MRGO occurred prior to NEPA’s enactment, the court was unpersuaded that later actions occurring after 1970 were excluded from NEPA compliance.

The court identified three ways the Corps violated the mandated requirements of NEPA: “1) the 1976 FEIS was fatally flawed; 2) the Corps never filed a SEIS even after it acknowledged substantial changes caused by the maintenance and operation of the MRGO; and 3) it improperly segmented its reporting guaranteeing that the public and other

agencies would remain uninformed as to the drastic effects the channel was causing.”²³ After reviewing the evidence, the court concluded that the Corps acted arbitrarily and capriciously regarding its obligations under NEPA. For these reasons, the Corps was without the benefit of the discretionary function exception to the FTCA.²⁴

Conclusion

The court constructed a dense and exhaustive discussion of not only the facts surrounding the MRGO and the LPV, but also of every element of the defenses of the Corps. The only cloudy spot from the vantage of the property owners dealt with damages. The court refused to allow punitive damages under Louisiana law, and limited the property owners’ actual damages that could be proven at court as a result of the flooding. The court awarded damages for six of the property owners, but refused to allow damages for one couple, based on their cause of action being primarily based on negligent installation of a surge protection barrier, which the court found was not supported by the evidence.²⁵

Endnotes

1. Mr. Lowrey received his J.D. from Tulane University Law School. He currently practices law in Jackson, Mississippi.
2. *In Re Katrina Canal Breaches Consolidated Litigation*; Pertains to: Robinson C.A. No. 06-2268, 647 F. Supp. 2d 644, 647 (E.D. La. 2009).
3. *Id.* at 649-50.
4. *Id.* at 651.
5. *Id.* at 651-52.
6. *Id.* at 652-53.
7. *Id.* at 653-55.
8. *Id.* at 666.
9. *Id.* at 675-76.
10. *Id.* at 681.
11. *Id.* at 698-99.
12. *Id.* at 699.
13. 28 U.S.C. § 1346(b).
14. *In Re Katrina Canal Breaches*, 647 F. Supp. 2d at 701.
15. *Id.* at 701-02.
16. *Id.* at 702.
17. *Id.* at 703.
18. *Id.* at 704.
19. *Id.*
20. *Id.* at 705.
21. *Id.* at 707-08.
22. 42 U.S.C. § 4332.
23. 647 F. Supp. 2d at 725.
24. *Id.* at 730.
25. *Id.* at 733-36.



Photograph of MRGO during levee break courtesy of NOAA.



2009 Mississippi Legislative Update

The following is a summary of legislation enacted by the Mississippi Legislature during the 2009 session.

- 2009 Mississippi Laws Ch. 320 (S.B. 2715)** (Approved March 9, 2009)
Authorize Department of Marine Resource employees to enter any private or public property as needed to enforce the Coastal Wetlands Protection Act.
- 2009 Mississippi Laws Ch. 395 (H.B. 1381)** (Approved March 18, 2009)
Designates the Escatawpa River from the Alabama-Mississippi state line in George County to its confluence with the Pascagoula River in Jackson County as a state scenic stream and includes it in the State Scenic Streams Stewardship Program.
- 2009 Mississippi Laws Ch. 429 (H.B. 519)** (Approved March 23, 2009)
Increases the maximum disbursement from the Mississippi Groundwater Protection Trust Fund to 1.5 million dollars per site for cleanup purposes resulting from releases from underground storage tanks.
- 2009 Mississippi Laws Ch. 494 (S.B. 3092)** (Approved April 6, 2009)
Extends repeal provisions for the Mississippi Gulf Coast Region Utility Board until July 1, 2011; removes funding from the Tideland Trust Fund.
- 2009 Mississippi Laws Ch. 500 (S.B. 2701)** (Approved April 6, 2009)
Revises the Coastal Wetlands Protection Act to provide for calculation of penalties for working without a permit on a “per day” basis.
- 2009 Mississippi Laws Ch. 495 (H.B. 32)** (Approved April 8, 2009)
Authorizes the Commission on Marine Resources to set permit fees and establish guidelines for the construction of artificial reefs in federal waters.
- 2009 Mississippi Laws Ch. 537 (S.B. 2843)** (Approved April 15, 2009)
Amends the Hurricane Damage Mitigation Program to require the Mississippi Windstorm Underwriting Association (Wind Pool) to provide a premium discount for individuals who build fortified homes.
- 2009 Mississippi Laws Ch. 362 (H.B. 33)** (Approved April 17, 2009)
Allows commercial oyster vessel operators to keep up to thirty-six blue crabs per day for personal consumption.~



2009 ALABAMA LEGISLATIVE UPDATE

The following is a summary of legislation enacted by the Alabama Legislature during the 2009 session.

2009 Ala. Laws 457 (H.B. 492) (Approved May 8, 2009)
Amends § 33-1-33 regulating control of vessels in bad repair to include vessels liable to sink, pollute adjacent waters, or vessels deemed derelict and raises the fine for failure to remove the vessel to \$5000.

2009 Ala. Laws 468 (S.J.R. 126) (Approved May 13, 2009)
Recognizes the week of September 14-19, 2009, as Alabama Soil and Water Conservation Week.

2009 Ala. Laws 488 (H.B. 452) (Approved May 13, 2009)
Designates the Manatee as the official State Marine Mammal.

2009 Ala. Laws 500 (S.B. 1) (Approved May 14, 2009)
Provides for insurance premium discounts or insurance rate reductions for homeowners who build, rebuild, or retrofit an insurable property to better resist hurricane or other catastrophic windstorm events.

2009 Ala. Laws 589 (H.B. 530) (Approved May 14, 2009)
Amends the Ala. Underground and Aboveground Storage Tank Trust Fund to provide for future protection of the soils and waters from releases from storage tanks, adds a definition of "occurrence," amends the definition of "motor fuels," and provides for indemnification of clean-up costs.

2009 Ala. Laws 776 (H.B. 659) (Approved May 22, 2009)
Amends the Waterways Advisory Board to include the Commissioner of Agriculture and Industries; includes "economic development for recreation" and "river-related community" in qualifying projects.~

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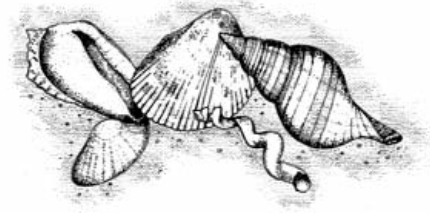
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Interesting Items

Around the Gulf...



In January, EPA proposed new water quality standards under the Clean Water Act to protect Florida waters. The proposed standards would decrease the amount of phosphorus and nitrogen allowed in Florida's lakes, rivers, streams, springs and canals. These nutrients can cause damage to drinking water sources, increase harmful algal blooms, and create harmful byproducts in drinking water. Primary sources of phosphorus and nitrogen pollution are stormwater runoff, municipal wastewater treatment, crop fertilization and livestock manure. Nitrogen pollution also comes from burning of fossil fuels, like gasoline. The proposal corresponds with a 2009 consent decree between EPA and the Florida Wildlife Federation, in which EPA committed to propose numeric nutrient standards for lakes and flowing waters in Florida by January 2010, and for Florida's estuarine and coastal waters by January 2011. The proposed action also introduces and seeks comment on a new regulatory process to sets standards, called restoration standards, aimed at improving water quality of already impaired waters. The new regulatory provision would be specific to nutrients in the state of Florida. For more on the proposed rule and public hearings: <http://www.epa.gov/waterscience/standards/rules/florida/> .

The U.S. Army Corps of Engineers (Corps) will now incorporate sea level rise considerations into water project designs based on a new guidance document. Under the new policy, the Corps must consider impacts to a project in light of three scenarios: 1) the historic rate of sea level rise; 2) estimated rates of sea level rise consistent with the projections of the Intergovernmental Panel on Climate Change (IPCC); and 3) a higher rate meant to address accelerated glacial melting considered underestimated by the IPCC. The ultimate goal is to select the project design that best accounts for the entire range of future sea level rise rates. By considering future impacts, the Corps aims to protect large federal investments in long-term infrastructure (like levees) from becoming obsolete or impaired as a result of rising water. Failure of flood controls in New Orleans following Hurricane Katrina sparked the new policy.



Photograph of New Orleans levee break courtesy of FEMA.

Texas public beach access gained greater protection in November when Texas voters passed ballot initiative Proposition 9 with over 75% voter support. Proposition 9, also known as House Joint Resolution 102, amends the Texas constitution to protect the right of the public, individually and collectively, to access and use the public beaches bordering the seaward shore of the Gulf of Mexico. Texans previously enjoyed this right under the Texas Open Beaches Act. The Act, passed in 1959, was designed to protect the public's right to access Texas beaches by establishing a rolling public easement from the line of vegetation to the shore. Building is prohibited in this area, including erection of fences. However, enforcement of the rolling easement was challenged in recent litigation. *See Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009). This raised concerns over litigation and potential legislative changes to the law which prompted the initiative. With its passage, Proposition 9 assures the continued public right to beach access in Texas. ♡



The University of Mississippi
WATER LOG
 Mississippi-Alabama Sea Grant Legal Program
 Kinard Hall, Wing E, Room 258
 P.O. Box 1848
 University, MS 38677-1848



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Editor: Niki L. Pace, J.D., LL.M.

Publication Design: Waurene Roberson

Contributors:

Joanna B. Wymyslo, J.D., LL.M.

Alexander Ignatiev, J.D.

Shawn Lowrey, J.D.

For information about the Legal Program's research on ocean and coastal law, or for past issues of WATER LOG, visit our homepage at

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