WATER LOG

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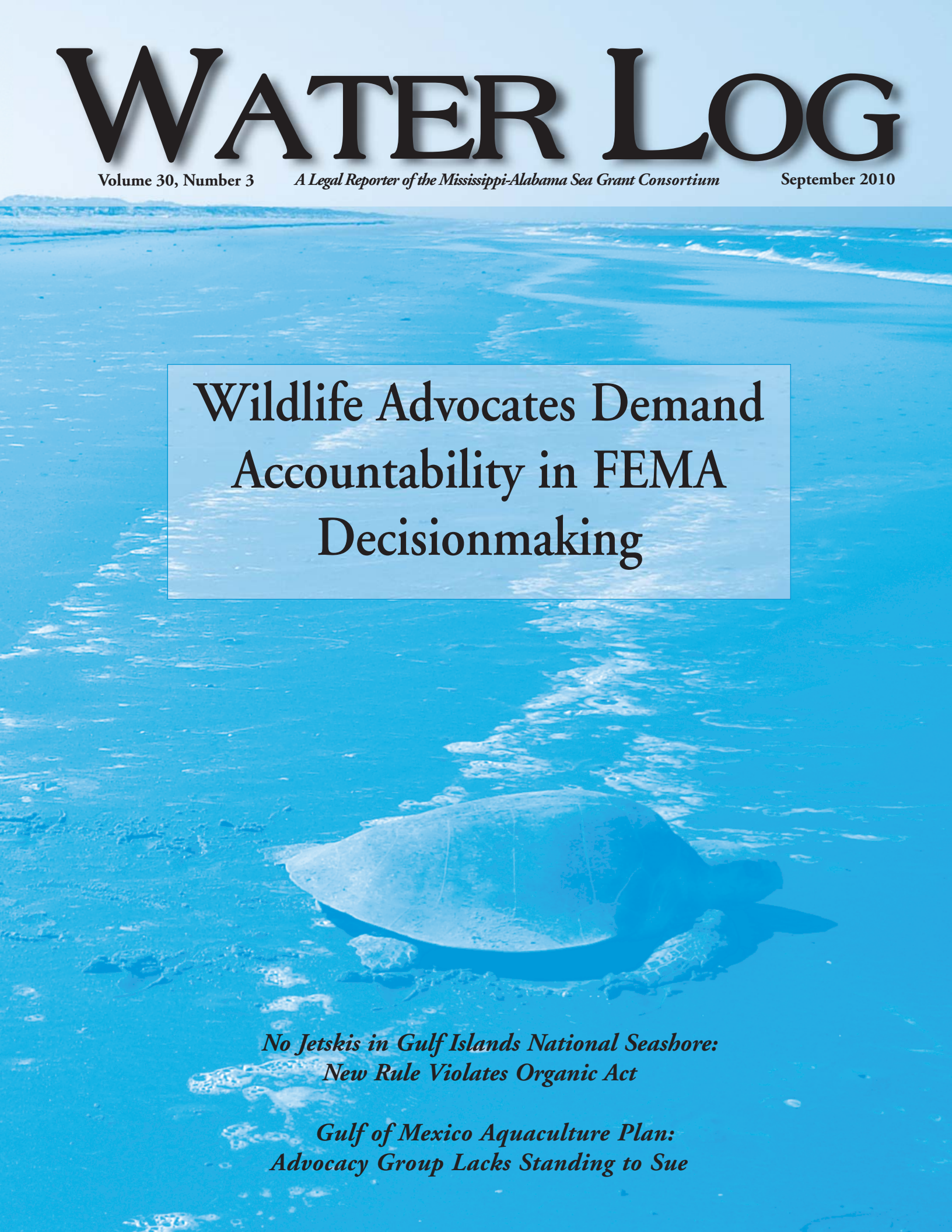

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Water Log

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From the Editor's Desk

As fall approaches, we are reminded of the fifth anniversary of Hurricane Katrina. Although five years have passed, disaster-related litigation continues to make its way through the courts. In one such article, April Hendricks discusses Mississippi's authority to erect seawalls for hurricane-related restoration efforts in Bay St. Louis, Mississippi. Guest contributor Joanna Wymyslo looks at how the Endangered Species Act impacts FEMA's flood map decisions. Another article examines the appeals process for FEMA's flood risk assessment.

Other articles examine a variety of legal issues in the Gulf of Mexico region. Mary McKenna reviews a recent decision rejecting the use of jetskis in Gulf Islands National Seashore. Lindsey Etheridge reviews an unsuccessful challenge to the Gulf of Mexico Aquaculture Plan. Another article addresses wind farm siting decisions in Texas.

And finally, the Gulf oil spill is capped. But while the spill is stopped, the litigation is only beginning. In August, the U.S. Judicial Panel on Multidistrict Litigation consolidated oil spill lawsuits in a New Orleans federal court. *Water Log* will continue to cover these emerging legal challenges in future editions.

As always, thank you for reading *Water Log*. We look forward to your suggestions and comments.

Niki Pace

Cover photograph of Kemp's ridley turtle at Padre Island National Seashore courtesy of the National Park Service.

Wildlife Advocates Demand Accountability in FEMA Decisionmaking

Joanna B. Wymyslo, J.D., LL.M.[1]

On July 13, 2010, the National Wildlife Federation and the Florida Wildlife Federation filed a lawsuit to enforce the § 7 consultation and conservation provisions of the Endangered Species Act (ESA) as they pertain to the Federal Emergency Management Agency's (FEMA) administration of the National Flood Insurance Program (NFIP).[2] These groups have litigated this issue on other occasions as to FEMA's § 7 obligations with regard to the impacts of flood insurance on Chinook salmon and Florida Key deer.[3] The wildlife groups now allege the NFIP encourages and facilitates new development in areas used by loggerhead, green, hawksbill, leatherback, and Kemp's ridley sea turtles. The following is a summary of the *Key Deer* case to illustrate how courts have required a more active role from federal agencies whose actions undergo § 7 consultation, as well as the likely issues in *National Wildlife Federation v. Fugate*.

ESA Consultation

When a federal agency proposes "any action authorized, funded, or carried out by such agency," the ESA requires that the agency consult with the Secretary as to whether any listed species might be present in the affected area in order to insure the proposed action "is not likely to jeopardize the continued existence" of listed species.[4] This provision is broadly interpreted to include "all activities or programs of any kind."[5] If a listed species might be present, the agency must do a "biological assessment" to determine whether that species is "likely to be affected" by the proposed action.[6] The power of § 7 requirements is that it takes some of the discretion away from the action agency and gives it to the Fish and Wildlife Service.

National Flood Insurance

FEMA administers the NFIP, a federal program to help property owners in flood-prone areas obtain insurance that would otherwise be prohibitively costly or unavailable.[7] To qualify, communities must submit floodplain management regulations that satisfy minimum land use criteria developed by FEMA to reduce future flood damage in the area.[8] If a community fails to adopt or enforce such land use regulations, local property owners are not eligible for federal flood insurance.[9] In NFIP-qualified communities, FEMA will either contract with private insurance providers to grant insurance to FEMA-approved applicants, or issue the insurance directly to property owners.[10] The NFIP offers reduced flood insurance rates through a Community Rating System as an incentive to encourage local governments to adopt land use regulations which exceed the minimum criteria.

The *Key Deer* Decision

In the recent case involving the Florida Key deer, the Eleventh Circuit held that FEMA was indeed bound by the ESA § 7 consultation and conservation requirements in administering the NFIP.[11] The case provides a platform for wildlife groups to join the trend of precedent-setting case law which requires action agencies to take affirmative steps to consider listed species and develop conservation measures prior to taking the proposed action.

First, the court considered whether the consultation requirement in § 7(a)(2) of the ESA applied to FEMA's administration of the NFIP. The answer depended on whether FEMA has discretion in implementing the NFIP and whether the issuance of flood insurance is a legally relevant "cause" of development that threatens the listed species. The court answered both questions affirmatively.

For the ESA to apply, the court initially established that FEMA has discretion in implementing the NFIP. Section 7(a)(2) "covers only discretionary agency actions and does not attach to actions … that an agency is required by statute to undertake once certain specified triggering events have occurred."[12] FEMA is required to

develop comprehensive eligibility criteria in order to make flood insurance available to those areas with adequate land use and control measures.[13] In developing the criteria, FEMA must consider "studies and investigations, and such other information as [it] deems necessary" to "develop comprehensive criteria designed to encourage, where necessary, the adoption of adequate State and local measures which, to the maximum extent feasible, will … otherwise improve the long-range land management and use of flood prone areas."[14] Although FEMA is required to issue flood insurance to localities that satisfy certain criteria, the Eleventh Circuit held FEMA has broad discretion in developing those criteria.[15]

FEMA also has broad discretion in implementing the community rating system because FEMA designed the program and must consider the protection of "natural and beneficial floodplain functions" in rewarding localities that exceed the minimum criteria with discounted insurance premiums.[16]

Photograph of Florida Key deer in mangroves courtesy of U.S.F.W.S., photographer Paul Frank.

Meeting the second requirement for ESA application, the court additionally found that the issuance of flood insurance is a legally relevant "cause" of development that threatens the listed species. Consultation is required for agency action that "may affect listed species or critical habitat" considering the "effects of the action as a whole."[17] This includes both direct effects and indirect effects which are "caused by the proposed action and are later in time, but still are reasonably certain to occur."[18] However, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[19] FEMA has the authority to prevent indirect effects of issuing flood insurance through the NFIP because it can tailor the eligibility criteria to prevent jeopardy to listed species. Therefore, "its administration of the NFIP is a relevant cause of jeopardy to the listed species."[20] Indeed, during formal consultation with FEMA, the FWS found that § 7 applies to the NFIP and that the NFIP jeopardizes listed species "because development is encouraged and in effect authorized by FEMA's issuance of flood insurance."[21]

The second issue was whether § 7(a)(1) of the ESA requires agencies to develop species-and-location-specific conservation programs. In addition to consultating with the FWS, § 7(a)(1) states "[a]ll federal agencies shall utilize their authorities in furtherance of the purpose of this chapter by carrying out programs for the conservation of [listed species] . . . ."[22] Conservation means "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."[23]

Federal agencies often ignore this section because the statutory language is somewhat unclear as to whether it imposes an affirmative duty on agencies to carry out programs to conserve each listed species. Some courts have interpreted § 7(a)(1) as only imposing a general conservation requirement "subject to the discretionary authority of each federal agency."[24] However, in *Florida Key Deer*, the Eleventh Circuit rejected that view in favor of imposing an affirmative, judicially reviewable duty on federal agencies to carry out programs to conserve each listed species. It held that it is not sufficient to merely select a program with an "insignificant" effect, but FEMA "must in fact carry out a program to conserve" listed species. Central to its decision was the fact that absolutely no communities developed or adopted conservation plans, meaning FEMA's incentive program

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Locals Lose CZMA Challenge to Texas Wind Farms

Niki L. Pace, J.D., LL.M.
(with research assistance from Barton Norfleet, 2012 J.D. Candidate, Univ. of Mississippi School of Law)

Kenedy County, Texas has become a hotbed of wind farm activity. The county is located in the far southern tip of the state along the Gulf of Mexico coast. According to the 2009 census data, the county population is under 400 making it one of the least populated counties in the country.[1] Texas Gulf Wind, LLC and Iberdrola Renewables, Inc are two private companies hoping to tap the prevailing winds of the area for energy by building wind-energy-generation facilities (wind farms). However, concerns over environmental impacts of the wind farms prompted a local group to challenge the wind farm construction in court. This summer, the Fifth Circuit Court of Appeals upheld the 2008 district court dismissal of legal challenges against the wind farms.

Background

The wind farms at issue are located in coastal Kenedy County on lands adjoining the Laguna Madre. The Laguna Madre is a long, shallow bay that extends along the Texas coast from Corpus Christi down to Port Isabel and into Mexico. The adjoining shoreline consists of a biologically diverse area of undeveloped land where three migratory-bird pathways converge.[2] The environmentally sensitive nature of the impacted lands caused local ranchers and other groups to form an alliance dedicated to the preservation of the Laguna Madre called the Coastal Habitat Alliance (Alliance).

The Alliance, concerned over potential environmental harms, brought suit against the developers and Texas agencies, including the Texas Public Utilities Commission. The Alliance alleged that its procedural rights had been violated under the Coastal Zone Management Act and the Texas Coastal Management Program. After an unsuccessful challenge at the district court level, the Alliance appealed to the Fifth Circuit.

Texas & the CZMA

Congress enacted the Coastal Zone Management Act (CZMA) of 1972 to encourage coastal states to implement comprehensive programs for preserving and restoring the nation's coastal resources. The CZMA provides federal funding for states to enact measures to guarantee both the protection of the nation's natural resources, including beaches, wetlands, dune systems, and wildlife, as well as the supervision of coastal development to minimize the destruction and despoliation of these resources.[3] Before a state may avail itself of the CZMA's opportunities, the state's management plan must be approved by the Secretary of Commerce for compliance with CZMA requirements. Regarding energy facilities, the state program must include "a planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities."[4]

In 1995, Texas created its Coastal Management Program (Texas Program) in accordance with the CZMA. Included in the Texas Program are measures designed to protect the environment from harm by new electric-generating facilities. To accomplish this goal, the Texas Program favors locating new electric-generating facilities at previously developed sites. Where facilities are proposed for undeveloped locations, the facility should be located where it will have the least adverse impacts practicable on "spawning, nesting, and seasonal migrations of terrestrial and aquatic fish and wildlife species"[5] and should avoid critical areas (including coastal wetlands). Under Texas law, adverse effects are those that result in physical destruction or detrimental alteration of the coastal zone, including disruption of migratory bird corridors.[6]

Under the Texas Program, the state Public Utility Commission (PUC) is required to comply with these policies when issuing Certificates of Convenience and Necessity (Certificates) to new electric-generation facilities.[7] The process for issuing Certificates includes public participation and the right of citizens to challenge the PUC's findings.[8] However, when the Texas legislature deregulated the utility industry, it eliminated the process for conducting a consistency review.[9] As a result of changes to utility regulation in Texas, few utilities are now required to obtain a Certificate[10] consequently eliminating the public process to challenge facility siting decisions through the consistency review process.

Because the Texas Program cites to an earlier provision of Texas law for the authority of the PUC to conduct a consistency review, the district court, relying on the language of that provision, determined that "[t]he wind farms are … subject to the Texas Program's requirements" including the requirement to obtain a Certificate.[11] The Alliance, therefore, argued that Texas "lacked the unilateral authority to eliminate consistency review" without engaging in the statutorily defined process for amendments which includes public participation.[12]

Procedural Rights & Preemption

According to the Alliance, the Texas agencies, in exchange for federal funding of the state coastal management plan under the CZMA, agreed to two things at issue here: 1) the agencies agreed to perform environmental consistency review of new electric-generation facilities, and 2) the agencies agreed to allow for public comment on the construction of new energy-generation facilities such as the wind farms in this case.[13] Because the Texas agencies failed to comply with these provisions of the Texas Program, the Alliance maintained that the agencies violated preemptive federal law under the Supremacy Clause as well as violated the Alliance's due process rights. In other words, the Alliance asserted that its "procedural rights" to a consistency review and public comment were violated, even though the Texas law requiring those provisions were repealed before the federal government approved the Texas Program, because the Texas Program continues to cite the repealed laws.[14]

In addressing the Alliance's arguments, the court acknowledged that "it is a fundamental principle of the Constitution … that Congress has the power to preempt state law."[15] However, the CZMA specifically denies preemption of state law: "nothing in this chapter shall be

Photograph of a Texas Wind Farm courtesy of David Scott.

construed … to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters . . . ."[16] Unless an actual conflict exists, the CZMA will not preempt state law. Because the CZMA does not expressly require public participation or consistency reviews of wind farm construction, the court determined that no actual conflict exists. In further support, the court pointed to the CZMA's built-in remedy for a state's failure to comply with the CZMA – the right to suspend and withdraw federal funding from a non-compliant state.[17]

Conclusion

Because the Fifth Circuit found no basis for recognizing the CZMA's preemption of the Texas Program, the Alliance had no basis for "procedural rights" which would have allowed it to challenge the agencies' actions. The court affirmed the lower court's decision to dismiss the case noting that the Alliance lacked legal grounds to bring the lawsuit.[18] "Inasmuch as the Texas program has failed to properly implement its own program, it is the withdrawal of funding, not the recognition of a preemptive 'procedural right,' that is the Congressionally intended method of ensuring compliance."[19]

Endnotes

1. U.S. Census Bureau, USA Quickfacts for Kenedy County, Texas, http://quickfacts.census.gov/qfd/states/48/48261.html (last visited Aug. 26, 2010).
2. Coastal Habitat Alliance v. Patterson, 2010 WL 2465032, *1 (5th Cir. June 17, 2010).
3. 16 U.S.C. § 1452(2).
4. *Id.* § 1455(d)(2)(H).
5. Coastal Habitat Alliance v. Patterson, 601 F.Supp.2d 868, at 872-73 (W.D.Tex. 2008).
6. 31 Tex. Admin. Code Ann. § 501.3(a)(1).
7. 601 F.Supp.2d at 873.
8. *Id.*
9. *Id.* at 874.
10. *Id.*
11. *Id.*
12. *Id.* at 875.
13. Coastal Habitat Alliance v. Patterson, 2010 WL 2465032, *1 (5th Cir. June 17, 2010).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at *3.
19. *Id.* at *2.

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"had *no* effect whatsoever" in nine years "and it is therefore not a program to conserve."[25]

Conclusion

The Eleventh Circuit's analysis in *Florida Key Deer* was one of the landmark decisions giving substance to the requirements of § 7(a)(1). This decision opens the door for public interest litigants to increase pressure on federal agencies which they believe are not adequately taking action to conserve listed species, such as sea turtles.

Endnotes

1. Associate at the law firm of Fowler White Boggs, in Jacksonville, Florida.
2. Nat'l Wildlife Fed'n v. Fugate, No. 1:10-cv-22300-KKM (S.D. Fla. filed July 13, 2010).
3. Nat'l Wildlife Fed'n v. FEMA, 345 F.Supp.2d 1151, 1172 (W.D. Wash. 2004); Fla. Key Deer v. Paulison, 522 F.3d 1133 (11th Cir. 2008).
4. 16 U.S.C. § 1536(a)(2)-(c)(1); *see also* 50 C.F.R. § 402.02 (defining "jeopardize the continued existence of [a listed species]").
5. 50 C.F.R. § 402.02 (defining "action").
6. 16 U.S.C. §1536(c)(1); *see also* 50 C.F.R. §402.12.
7. 42 U.S.C. § 4001; 44 C.F.R. §59.2(a).
8. 44 C.F.R. § 59.2(b).
9. 42 U.S.C. § 4022(a)(1); 44 C.F.R. § 60.1(a).
10. 44 C.F.R. §§ 62.1, 62.23, 62.3.
11. Fla. Key Deer v. Paulison, 522 F.3d 1133 (11th Cir. 2008).
12. Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 551 U.S. 644, 127 S.Ct. 2518, 2536 (2007).
13. 42 U.S.C. § 4102(c).
14. *Id.*
15. *Fla. Key Deer*, 522 F.3d 1133.
16. 42 U.S.C. § 4022(b)(1)(B).
17. 15 C.F.R. § 402.14(a), (c).
18. 15 C.F.R. § 402.02.
19. Dep't of Transportation v. Public Citizen, 541 U.S. 752, 770 (2004).
20. *Fla. Key Deer*, 522 F.3d at 1144.
21. *Id.*
22. 16 U.S.C. §1536(a)(1).
23. 16 U.S.C. §1532(3).
24. *Fla. Key Deer*, 522 F.3d at 1146.
25. *Id.* at 1147 (emphasis in original).

Mississippi's Seawall Act Upheld

April Hendricks, 2012 J.D. Candidate, Univ. of Mississippi School of Law

Following Hurricane Katrina, the Mississippi Gulf Coast suffered extensive infrastructure damage. Bay St. Louis, Mississippi, located along the state's western coastal border with Louisiana, was particularly crippled by the storm and needed extensive repairs. Beach Boulevard (also known as Highway 90) runs parallel to the shoreline along the Mississippi coast. The city of Bay St. Louis, in conjunction with the Hancock County Board of Supervisors, began a $33 million restoration of the seawall protecting Beach Boulevard in Bay St. Louis, in accordance with the Mississippi Seawall Act. Five property owners affected by the restoration challenged the County's legal authority to proceed. In May, the Mississippi Supreme Court, siding with Hancock County, upheld the constitutionality of Mississippi's Seawall Act.[1]

Background

In 2005, Hurricane Katrina destroyed portions of the seawall protecting Beach Boulevard in Bay St. Louis, Mississippi. The U.S. Army Corps of Engineers (Corps) offered to reconstruct the damaged seawall in Hancock County using federal funds; the planned construction would occur seaward of the previous seawall on public trust lands belonging to the state, which holds the title to these lands for the use and benefit of the public. From the outset of this project, the Hancock County Board of Supervisors followed the procedures outlined by the Seawall Act, which provides the means by which a county may acquire property for and construct a seawall when the need arises.[2]

In order to rebuild the seawall, the Corps required temporary construction easements from neighboring landowners. Specifically, the Corps required temporary easements over nearby properties, allowing them to access and use the land at no charge for 36 months as the construction proceeded. In accordance with the Seawall Act, the Corps sent letters to these landowners in August 2008 and February 2009 explaining the need for both the seawall and for access to portions of their properties to facilitate the construction process. Though many landowners granted the necessary easements to the Corps, five landowners, including Daricek, refused to grant temporary access to their property without compensation.[3]

The Board of Supervisors proceeded to condemn these properties under the Seawall Act and published notice of the condemnation in a Hancock County newspaper.[4] When the landowners responded with claims for compensation, the Board notified the landowners of their plan to conduct a site inspection to assess the potential damages. Following the inspection, the Board unanimously voted against compensation and approved the taking of the properties, contending that the lack of compensation was justified because the proposed seawall would increase the values of these properties.[5]

The landowners appealed the Board's decision to the Hancock County Circuit Court, alleging that the Seawall Act was unconstitutional and had been repealed or superseded by the Real Property Acquisitions Policy Act (RPAPA). The circuit court affirmed the decision of the Board, noting that, because the landowners had notice of the condemnation proceedings and an opportunity to be heard, their due process rights had not been violated by the Seawall Act. Furthermore, the court found that both the Seawall Act and the RPAPA applied to Board's decision to condemn the properties for the seawall construction project and that the Board had adequately complied with both statutes.[6] The landowners appealed to the Mississippi Supreme Court on the issue of the Seawall Act's constitutionality.

The Seawall Act

The Mississippi Legislature enacted the Seawall Act in 1924 to outline the manner in which private property abutting the beach or shoreline may be taken for public use. This Act authorizes a county, by acting through its board of supervisors, to finance the construction of and condemn private property for the creation of a seawall to protect public roads. In order to condemn properties under this Act, the Board must certify to the governor that the erection of a seawall is essential for the protection of a public road, and the governor must then appoint five citizens of the affected county to serve as the Road Protection Commission of that county.[7]

If the Road Protection Commission determines that the construction of a seawall is necessary to maintain the integrity of the public road system, then the Commission must publish notice of the seawall's construction for 30 days in a county newspaper. Any landowner claiming compensation for land taken in association with such a construction project must petition the Board within 30 days of the time limit published in the newspaper notice. In assessing such claims for damages, the Board must inspect the landowners' properties after providing the petitioner with five days' notice of the site assessment. After determining the damages sustained by the landowner, if any, the Board must enter their official findings at their next meeting.[8]

Should the landowner be dissatisfied with the Board's assessment of damages, the Act grants the landowner the right to appeal the decision to the circuit court. The Act further provides that the question of damages may be determined by a jury if the landowner so desires.[9] Accordingly, if a property owner is aggrieved by the condemnation proceedings authorized under the Seawall Act, he may seek relief in the judicial system, and ultimately, the Act ensures that the final assessment of damages will be made by the landowner's peers rather than by the Board seeking the condemnation of his property.

Constitutionality of the Seawall Act

The Mississippi Supreme Court found that the landowners failed to establish that the Seawall Act violated their due process rights; thus, the court upheld the Act as a constitutional exercise of power by the Mississippi Legislature.[10] The court has held in the past that two days notice is constitutionally insufficient, while 30 days notice does not violate due process.[11] Because the Seawall Act requires 30 days of publication notice and further provides landowners with 30 additional days to submit claims for damages, the court found that this Act preserves the due process rights of all affected parties.

Moreover, the court pointed to the standard for due process articulated by the U. S. Supreme Court in *Matthews v. Eldridge*, stating that "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[12] The Seawall Act allows landowners to submit a written claim of damages to the Board, accompany the assessors to the property inspection, appeal the Board's decision to the circuit court, and request a jury trial on the issue of damages; therefore, the court determined that, by protecting the interests of landowners affected by the construction of new seawalls, the Act clearly complied with the *Matthews* standard.

RPAPA

The Real Property Acquisitions Policy Act (RPAPA), enacted by the Mississippi Legislature in 1972, imposes certain requirements on condemnors of property and is, in many ways, distinguishable from the Seawall Act. For instance, condemnors must exhaust reasonable efforts to acquire property through negotiations before resorting to condemnation,[13] whereas the Seawall Act does not address the negotiation process. Under both the Seawall Act and the RPAPA, the property owner must be given the opportunity to accompany the appraiser on an evaluation of the potential property damages.[14] The RPAPA also requires that the condemning authority not

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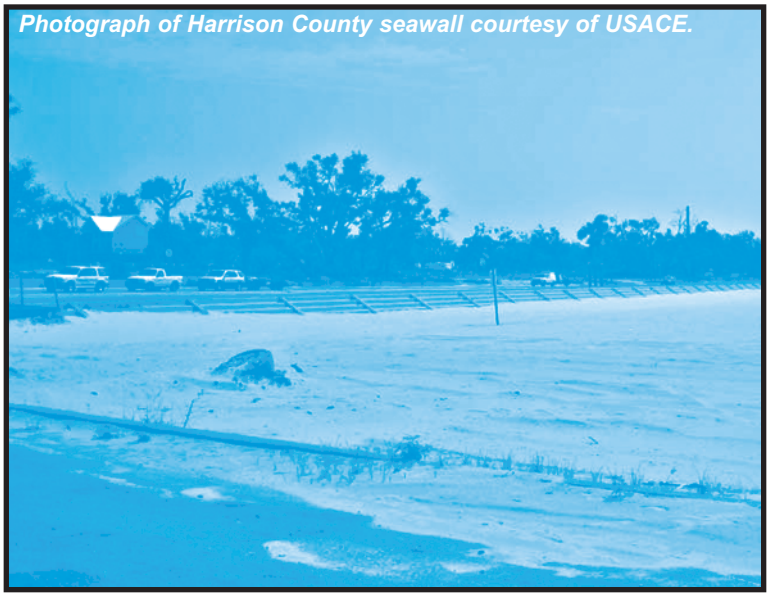

Photograph of Harrison County seawall courtesy of USACE.

No Jetskis in Gulf Islands National Seashore:
New Rule Violates Organic Act

Mary McKenna, 2011 J.D. Candidate, Univ. of Mississippi School of Law

While use of jetskis in national parks was generally banned in 2000, the Gulf Islands National Seashore, located along the Gulf Coast of Florida and Mississippi, is an exception. The regulations permitting the continued use of jetskis in the park recently came under judicial scrutiny. In 2008, environmental groups initiated legal proceedings against the National Park Service over the jetski rule. As discussed in more detail below, a federal district court, in July, found the rule failed to comply with applicable federal laws and remanded the rule to the National Park Service.

Background

Historically, jetskis were permitted in the National Park System until the mid-1990s, when jetski use intensified, causing an increase in noise and pollution. In response, the National Park Service (NPS) banned jetskis in all but 21 of the national parks via the National Jetski Rule, which went into effect in April 2000. Bluewater Network, concerned that the National Jetski Rule inadequately protected the 21 exempted parks, filed suit against NPS. That litigation (*Bluewater I*) resulted in a Settlement Agreement, which required that the exempted parks be allotted a two-year grace period of continued jetski use, during which time the parks were to develop and implement park-specific regulations governing jetskis. If, after the two-year grace period, a park did not issue a park-specific regulation, jetskis would be completely banned.[1] If the NPS wished to permit jetski use after the grace period expired, special, site-specific regulations would have to be implemented, subject to a national notice and comment period and appropriate analysis under the National Environmental Policy Act (NEPA).[2]

Located in the northeastern section of the Gulf of Mexico, Gulf Islands National Seashore (Gulf Islands) consists of a 160-mile expanse of barrier islands and waters from the eastern end of Santa Rosa Island in Florida to Cat Island in Mississippi. In addition to its snowy-white beaches, blue waters, coastal marshes and maritime forests, Gulf Islands boasts forts, picnic areas, nature trails, campgrounds and regionally important ecological sites that host endangered species.[3] As one of the 21 exempted parks, Gulf Islands could allow jetski use until 2002, when its grace period would expire. As mentioned above, if jetski use at the park was to continue after 2002, Gulf Islands needed to issue a special regulation governing jetskis and conduct a NEPA review.

In 2001, Gulf Islands' Superintendent conducted a study (2001 Determination) of the effects of jetski use within the park, ultimately determining that jetskis negatively impacted the water quality, wildlife, and other visitors' enjoyment of the park; the findings supported a ban of jetski use. In 2002, Gulf Islands allowed the grace period to expire, thus banning jetski use in the park.

NPS then conducted an Environmental Assessment (EA) to analyze the impact of jetskis on the park. The EA considered three alternatives: 1) a no action alternative, which would continue the ban on jetskis; 2) Alternative A, which would again allow jetski use in the park at the same level that existed before the national ban; and 3) Alternative B, which would also reinstate jetski use, but would further limit it through issuance of certain restrictions. NPS then evaluated the impacts of each alternative on water quality; air quality; soundscapes; shoreline and submerged aquatic vegetation; wildlife and wildlife habitat; aquatic fauna; threatened, endangered and special status species; and visitor use and safety. NPS ultimately concluded that jetski use should be permitted in the park, under Alternative B. The proposed rule was published for public comment, and in January 2006, NPS issued a "findings of no significant impact" (FONSI). In May 2006, NPS issued a final rule (Gulf Islands Rule) once again permitting jetski use in Gulf Islands, subject to certain limitations.[4]

In May 2008, Bluewater Network, The Wilderness Society, Enid Sisskin, and Robert Goodman (collectively Bluewater) filed suit against the National Park Service and others (collectively NPS) challenging the re-introduction of jetskis into Gulf Islands.[5] Bluewater alleged that NPS had acted arbitrarily and capriciously under the Administrative Procedure Act (APA) when it allowed jetski use in the park after having banned jetskis under both the National Jetski Rule and the 2001 Determination. Further, Bluewater maintained that re-introduction of jetskis into the park violated the Organic Act, NEPA, and the terms of the Settlement Agreement of *Bluewater I*. More specifically, Bluewater contended that the EA prepared by NPS unreasonably concluded that jetski use was permissible, and that the NPS' FONSI and Gulf Islands Rule had improperly relied on the EA's conclusion that the re-introduction of jetski use would not impair Gulf Islands, which resulted in the lifting of the jetski ban.

The National Park Service Organic Act

The Organic Act gives the NPS authority to manage federal lands and provides that NPS must:

> promote and regulate the use of … national parks … to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.[6]

NPS has broad discretion to determine what actions are best calculated to protect park resources and must strike the appropriate balance between prioritizing conservation and providing for use and recreation by the public.

Although Bluewater suggested that NPS' reversal of earlier jetski policies in Gulf Islands required a heightened standard of review, the court concluded that no heightened standard of review was necessary when examining an agency's change of course in policy. Rather, the court held that determining whether the agency's actions were arbitrary and capricious required a determination of whether the agency had supplied a "rational connection between the facts found and the choice made."[7] Additionally, in conducting an APA review, the court stressed the importance of scrutinizing the administrative record to ensure that a "thorough, probing, in-depth" examination as required by statute had been conducted.[8]

The court held that NPS had authority to revisit the ban on jetski use under the National Jetski Rule and Settlement Agreement, but that NPS failed to provide a clear, reasoned, and adequately justified analysis in arriving at its final decision to re-introduce jetskis to Gulf Islands. NPS failed to meaningfully explain how the facts found "led to the conclusion that each impact was not an 'impairment' under the Organic Act."[9]

After conducting an EA analysis of each alternative, NPS concluded that jetski use under Alternative B's limits would not result in any impairment to park resources. Specifically, NPS concluded that Alternative B would generate only negligible to minor adverse impacts on water quality, air quality, soundscapes, vegetation and wildlife. In terms of visitor experience and safety, however, NPS found that Alternative B created a beneficial impact on jetski users and a variety of adverse impacts on non-jetski users.[10] NPS based its analysis on the "conservative" assumption that jetski users would be operating older, noisier, and more polluting two-stroke jetskis. However, at times, NPS claimed that certain impacts would be minimized by eventual transition to more environmentally friendly four-stroke jetskis in the future. NPS failed to explain its inconsistencies in measuring impacts sometimes based on two-stroke jetskis and sometimes based on four-stroke jetskis, and further failed to prove the assumption that four-stroke jetskis would displace two-stroke jetskis by 2012.

With regard to measuring water quality impacts of jetskis, NPS concluded in its EA that despite an increase of more than 66% in expected emissions from jetskis, a "negligible" impairment would result, without any explanation of how this result could logically follow.[11] Therefore, the court held that without a specific and detailed explanation as to how NPS arrived at this conclusion, no rational connection existed between the facts

Photograph of sunset at Ft. Pickens (part of the Gulf Islands National Seashore) courtesy of NPS.

found (quantitative data) and the final conclusions reached (negligible impact and non-impairment). In addition, NPS failed to articulate why it relied on water quality standards applicable to various locations across the country instead of water quality standards appropriate to the value and resources of a specific park.[12]

As for air quality, NPS concluded that adverse impacts under Alternative B would be negligible based on the benchmark that emissions would be less than 50 tons/year for each pollutant; but NPS provided no explanation as to where the standard of 50 tons/year was derived from or why that benchmark applied uniformly to pollutants whose national standards differ significantly among the national ambient air quality standards (NAAQS).[13] The court concluded that without further explanation of how the tonnage cutoff of 50 tons/year supported a non-impairment finding for all pollutants, NPS again failed to provide the necessary rational connection between its factual data and its ultimate conclusion. Moreover, the court noted that NPS failed to articulate why NAAQS represented the appropriate benchmark for measuring air quality in national parks when those standards are national air quality maximums that neglect to consider the possibility that specific park air quality may be different or even much lower.

Image courtesy of ©Nova Development Corp.

Regarding soundscapes, NPS used as its benchmark a statute created for enforcement purposes, not impact assessment purposes; again, NPS gave no explanation as to why that standard was appropriate. Nor did NPS explain why, if on peak days, noise levels from jetski use would exceed the standard set forth in the statutory benchmark, the impact on soundscapes was categorized as "negligible to minor adverse."[14] In addition, NPS relied heavily on the future conversion from two-stroke to quieter four-stroke jetskis as a basis for minimizing impacts to soundscapes. Again, the court concluded that NPS failed to make a rational connection between its quantitative data and its final conclusion

Although NPS acknowledged in its vegetation analysis that increased jetski use by 2012 would heighten impacts on vegetation, it concluded that no impairment would occur and that the impact on vegetation both on the shoreline and in the water would be negligible to minor despite potential serious impacts such as "collision, uprooting, and sediment alteration."[15] Once again, the court determined that NPS failed to provide any necessary rational connection between the finding of non-impairment and the data observed.

Additionally, the court found NPS' definition of "impairment" on wildlife "draconian" and inconsistent with its obligations under the Organic Act to "conserve … the wildlife … as will leave them unimpaired for the enjoyment of future generations."[16] Furthermore, the court was troubled by NPS' conclusion that Alternative B presented only "long-term minor to moderate, adverse impacts to aquatic fauna," despite data that determined bottlenose dolphins would experience substantially reduced echolocation and communication abilities when exposed to the noise of just two jetskis, far less than the expected number of jetskis on a typical summer day.[17] Because there was no mention of how this impact on bottlenose dolphins related to the non-impairment determination for wildlife and/or aquatic fauna, the court concluded that NPS yet again failed to make clear the connection between the data and its conclusion.

NPS' examination of jetski effects on visitor use and safety resulted in a beneficial impact assessment for jetski users and an adverse impact for non-users. The court held that NPS' lack of explanation as to why moderate adverse impacts to non-users did not rise to the level of impairment when those non-users might be driven out of the park, was merely a conclusory assessment that did not support NPS' obligations under the Organic Act or its duties to clearly find a rational connection between its data and its conclusions.

For these reasons, the court concluded that the Gulf Islands Rule was arbitrary and capricious; NPS' conclusion that re-introduction of jetski use would result in non-impairment under the Organic Act was not based on reasoned explanations that articulated a rational connection between the facts found and the policy choice made, but rather on profoundly flawed, internally inconsistent,

unsupported assertions in the EA. Without a rational explanation, the court found NPS' final determinations to be impermissibly conclusory in violation of the Organic Act and remanded the case to NPS in order to provide adequate reasoning for its conclusions.[18]

NEPA

The National Jetski Rule and the Settlement Agreement required that NPS comply with NEPA's procedural requirements during the site-specific rulemaking process regarding re-introduction of jetskis into Gulf Islands. NEPA requires necessary procedural processes in which federal agencies must "take a 'hard look' at the environmental consequences before taking a major action."[19] The court found that NPS failed to take the requisite "hard look" at the relevant environmental concern in preparing the EA, which, as discussed above, was both conclusory and inadequate in its explanation of the connections between objective facts and conclusions reached.[20] Therefore, the court concluded that because both the Gulf Islands Rule and the FONSI relied on the inadequate reasoning of the EA, NPS could not make a convincing case as to its findings as required by NEPA. Accordingly, the court found the Gulf Islands Rule and FONSI arbitrary and capricious, and an abuse of NPS' discretion, and remanded the case to NPS so that it could provide adequate reasoning.

Settlement Agreement

The court held that the Settlement Agreement compelled NPS to comply with the terms of NEPA during the process to adopt site-specific regulations for Gulf Islands. The Settlement Agreement, however, did not require NPS to undertake park-specific studies in order to analyze park-specific impacts; NPS could rely on studies conducted at other locations in order to assess impacts particular to Gulf Islands and still be consistent with NEPA. In short, the court concluded that the Settlement Agreement required that NEPA be followed, but required no more than that. Accordingly, the court found that the Settlement Agreement was breached to the extent that NPS failed to meet NEPA's "hard look" requirement, as discussed above.[21]

Conclusion

The court found fundamental problems in NPS' EA, Gulf Island Rule and FONSI, and remanded the case to NPS to provide adequate reasoning for its conclusions. If, then, NPS is able to put forth convincing reasons in support of the interpretation of quantitative facts that the environmental impact and impairment with regard to jetski re-introduction into Gulf Islands is insignificant, and if NPS follows the procedural requirements of NEPA and the terms of the Settlement Agreement in the process, the court is likely to determine that the agency's change of policy was not arbitrary and capricious. In short, if on remand NPS is able to adequately explain its change in policy by rationally connecting quantitative facts found with its final conclusions that each impact was not an "impairment" under the Organic Act, the Gulf Island Rule is likely to stand. It remains to be seen, however, if NPS will be able to accomplish this given that NPS is now charged with the responsibility of not only explaining the data acquired but also explaining from where the standards and benchmarks interpreting this data were derived.

Endnotes

1. Bluewater Network v. Salazar, 2010 WL 2680823, at *2 (D.D.C. July 8, 2010).
2. *Id.* at *3. *See* Settlement Agreement at ¶ 5.
3. *Bluewater Network*, 2010 WL 2680823, at *5.
4. *Id.*
5. Although not discussed in this article, Bluewater also sued NPS for the re-introduction of jetskis in Pictured Rocks National Lakeshore in Michigan. *Id.* at *1.
6. 16 U.S.C. § 1.
7. *Bluewater Network*, 2010 WL 2680823 at *13.
8. *Id.* at *22.
9. *Id.* at *15.
10. *Id.* at *17.
11. *Id.* at *20.
12. *Id.* at *21.
13. NAAQS vary considerably for each pollutant. For instance, for nitrogen dioxide, the NAAQS maximum is 100 micrograms per cubic meter; for particulate matter, 50 micrograms per cubic meter; for fine particulate matter, 15 micrograms per cubic meter. *Id.* at *22.
14. *Id.* at *17.
15. *Id.* at *25-26.
16. *Id.* at *26. The EA's wildlife analysis defined "impairment" as such: "[A]n impairment at Gulf Islands occurs only when impacts are so intense or sustained that they result in 'the elimination of a native species or significant population declines in a native species.'" *Id.*
17. *Id.* at *27.
18. *Id.* at *30.
19. *Id.* at *29.
20. It should be noted that NPS' impairment analysis under the Organic Act also served as its NEPA analysis, relying on the same reasoning in making arguments under both the Organic Act and NEPA. *Id.* at *30.
20. *Id.* at *36.

Seawall from page 9

intentionally make it necessary for a landowner to institute legal proceedings to establish that his or her property has been taken without just compensation.[15]

The landowners in this case alleged that the RPAPA repealed or superseded the Seawall Act and thus requested that the RPAPA, rather than the Seawall Act, be applied to their circumstances. The court found that, because the RPAPA never directly references the Seawall Act, the Act has not been directly preempted. Moreover, because the RPAPA and the Seawall Act can be construed in harmony with one another, the Act has not been preempted by implication. The landowners argue that, because the Act requires the property owner to make a claim for damages and file an appeal in the circuit court, the Act cannot be harmoniously applied alongside the RPAPA's requirement that the condemning authority not intentionally promote legal proceedings.

However, the court found that the Seawall Act provides for adjudication of the question of damages but does not, like the RPAPA, require the landowner to establish that a taking has occurred; therefore, the two statutes do not obviously conflict with one another. Thus, the RPAPA does not supersede the Seawall Act and these statutes may both be applied where appropriate.[16]

Conclusion

The Mississippi Supreme Court affirmed the holding of the Circuit Court of Hancock County, ruling that the Seawall Act is constitutional. The court noted that the Board had complied with all relevant sections of the Seawall Act and the RPAPA in condemning the landowners' properties and, thus, the Board did not infringe on the landowners' constitutional rights by condemning the land to facilitate the seawall's restoration. Essential for the continued protection of Beach Boulevard, the seawall reconstruction plans can proceed as scheduled as a result of the court's decision.

Endnotes

1. Daricek v. Hancock County, 34 So.3d 587, 590 (Miss. 2010).
2. Miss. Code Ann. § 65-33-1 et. seq. (Rev. 2005).
3. *Daricek*, 34 So.3d at 591.
4. *See* Miss. Code Ann. § 65-33-23.
5. 34 So.3d at 591.
6. *Id.* at 592.
7. Miss. Code Ann. § 65-33-27.
8. *Id.* § 65-33-31.
9. *Id.*
10. 34 So.3d at 597.
11. Branaman v. Long Beach Water Mgmt. Dist., 730 So.2d 1146, 1150 (Miss.1999); Miss. Bd. of Veterinary Med. v. Geotes, 770 So.2d 940, 944-45 (Miss. 2000).
12. 424 U.S. 319, 333 (1976).
13. Miss. Code Ann. § 43-37-3(a) (Rev. 2009).
14. *Id.* § 43-37-3(b).
15. *Id.* § 43-37-3(h).
16. 34 So.3d at 597-600.

Photograph of sand being moved back to existing seawall in Hancock County after Hurricane Katrina erosion courtesy of USACE.

Gulf of Mexico Aquaculture Plan

Advocacy Groups Lack Standing to Sue

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A federal district court in Washington, D.C. recently dismissed a case challenging the Fishery Management Plan for Regulating Offshore Marine Aquaculture in the Gulf of Mexico (Gulf Plan or the Plan).[1] The Plan authorizes the issuance of permits for offshore aquaculture in federal waters in the Gulf of Mexico. Three advocacy groups, Gulf Restoration Network, Food & Water Watch, and Ocean Conservancy, challenged the Plan, claiming that it violated three federal laws.

Background

Offshore aquaculture is the farming of aquatic animals in federally managed areas of the open ocean through the use of floating or submerged net-pens or cages. Federal waters begin where state jurisdiction ends, generally three nautical miles offshore Alabama, Mississippi, and Louisiana and nine nautical miles off the Gulf coast of Florida and Texas, and extend 200 miles offshore. Several aquaculture operations exist in state waters, where research is conducted and commercial production is ongoing. In federal waters, only a few aquaculture activities have been permitted, such as live rock aquaculture. The Gulf Plan is the first plan that would allow commercial finfish offshore aquaculture operations in U.S. federal waters.[2]

Currently, 80 percent of the seafood consumed in the U.S. is imported, with about half of those imports from aquaculture. Promoters of offshore aquaculture in the Gulf of Mexico cite this figure and the growing demand for seafood in the U.S., as well as several problems with imported seafood from overseas aquaculture, including from China and southeast Asia. Opponents include environmental and fishing industry groups who argue that waste from aquaculture activities could harm wild fish in the Gulf and disrupt traditional fishing communities.[3]

The Gulf Aquaculture Plan

Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Department of Commerce, through the National Marine Fisheries Service (NMFS), regulates the nation's marine fisheries. The Gulf of Mexico Fishery Management Council (Gulf Council) is one of eight Regional Councils established by the MSA to develop fishery management plans for fisheries in U.S. federal waters.[4]

The Gulf Council composed a plan to authorize commercial offshore aquaculture facilities in the Gulf of Mexico. The Plan provides for between five and twenty offshore aquaculture operations to be permitted in the Gulf over the next ten years, with an estimated annual production of up to 64 million pounds of fish. The Gulf Council pursued development of the Plan because it believes commercial wild-capture fisheries are being fished beyond sustainable levels and are likely unable to meet the growing demand for seafood in the U.S.[5]

The Plan includes an Environmental Impact Statement, which evaluates potential environmental impacts to water quality, wild stocks, and fishing communities and offers a range of solutions for reducing any adverse effects to the ecosystems in the Gulf.[6] It also sets forth a number of environmental safeguards, which include the following: limiting the species that may be cultured to only fish that are native to the Gulf of Mexico, capping the total amount of fish that can be cultured annually, and establishing record-keeping, reporting, and operation requirements designed to minimize or mitigate potential environmental impacts.[7]

The Gulf Council submitted its proposed plan to NMFS, and pursuant to the MSA, NMFS published notice of the Plan on June 4, 2009. Following a 60 day public comment period, the Secretary of Commerce had 30 days to either approve, disapprove, or partially approve the plan and any amendments.[8] Under the MSA, if the Secretary takes no action on a proposed

plan at the expiration of those 30 days, the plan is automatically approved. After the Secretary purposefully chose not to act on the Plan, it automatically took affect on September 3, 2009. This approach was unprecedented and controversial. The Secretary explained in a letter to the Gulf Council that the Plan "raised important issues of national policy regarding the manner in which offshore aquaculture is regulated."[9] The Secretary did not want to affirmatively approve or disapprove the plan in the absence of a comprehensive national policy addressing the development of offshore aquaculture operations. Instead, NMFS advised the Gulf Council not to implement the Plan until a national policy was developed and it was able to examine the Plan in the context of that policy.

The advocacy groups filed suit against NMFS and the Secretary of Commerce after the Plan took affect by operation of law claiming that the Plan violates the MSA, the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA). NMFS moved to dismiss the case on three grounds: the groups lacked standing, their claims were not ripe for adjudication, and they lacked a statutory cause of action under both the MSA and the APA. As discussed below, the court ultimately agreed.

Standing

First, the court found that the groups lacked standing to sue because they had suffered no injury as a result of the Plan. Before someone may challenge agency action in court, there must be an actual "case or controversy" and the person bringing the case must have standing to sue. A person has standing only when he or she has suffered an actual injury or when an injury is imminent; the injury must be caused by the party against whom the suit is filed, and the court must be able to redress the plaintiff's injury.[10]

Since the Plan has not been implemented, the advocacy groups have suffered no actual injury. They asserted, however, that injury was imminent. For example, one member claimed, "aquaculture facilities in the Gulf of Mexico will hurt [his] personal interest in the well-being of the Gulf, as well as [his] business by damaging the ecosystem and harming wild fish populations."[11] Unfortunately, this claim does not

Photograph of ocean spar cage deployed in Gulf of Mexico courtesy of the Mississippi-Alabama Sea Grant Consortium.

allege an injury that is likely to occur in the near future. This claim is an allegation of future harm contingent on aquaculture facilities being permitted in the Gulf and negatively impacting the environment.

The court concluded that harm to the advocacy groups' members was not imminent because several steps must be taken before aquaculture operations can begin in the Gulf. Regulations must first be written, approved, and adopted to establish the framework for issuing permits under the Plan. Only then may permits, which have to be reviewed and approved by a number of federal agencies, be issued. This process could take years and it is not clear at this point whether permits will ever be issued pursuant to the Plan. Because the harms alleged are not imminent, the advocacy groups do not have standing to challenge the Plan.

Ripeness

Second, the court found that the groups' claims were not ripe for adjudication, i.e., their claims were premature and not based on concrete evidence. Since the Plan has not been implemented and no regulations are in place, the court had no concrete basis on which to evaluate the Plan's effect on the groups' interests and the impact of aquaculture in the Gulf of Mexico. Courts cannot address a case contesting a government policy "when the challenged policy is not sufficiently fleshed out to allow the court to see the concrete effects and implications of its decision or when deferring consideration might eliminate the need for review altogether."[12]

The Gulf Plan has not been "fleshed out" because no regulations have been adopted that would even allow aquaculture operations to begin. Depending on what regulations are passed and what requirements are put in place for obtaining permits, aquaculture activities in the Gulf may be carried out in several different ways. Aquaculture could even be completely denied if NMFS decides that the Plan does not comport with national policy. Therefore, the circumstances surrounding the groups' claims were not sufficiently concrete for the court to determine the impact of aquaculture in the Gulf and whether the groups may suffer any harm.

Statutory Claims

Finally, the court found that the groups did not have a statutory claim under either the MSA or the APA. The MSA provides for judicial review of "regulations promulgated by the Secretary" and "actions taken by the Secretary under regulations which implement a [fishery management plan]."[13] It does not specifically provide for judicial review of fishery management plans. The Secretary has not promulgated any regulations nor taken any action under regulations which implement the Gulf Plan. Also, the Secretary's inaction, which allowed the Plan to take effect automatically, did not constitute the promulgation of a regulation because the Plan is not characterized as a regulation and has no binding effect. For similar reasons, the court also found the groups lacked a statutory claim under the APA because no final agency action had taken place.

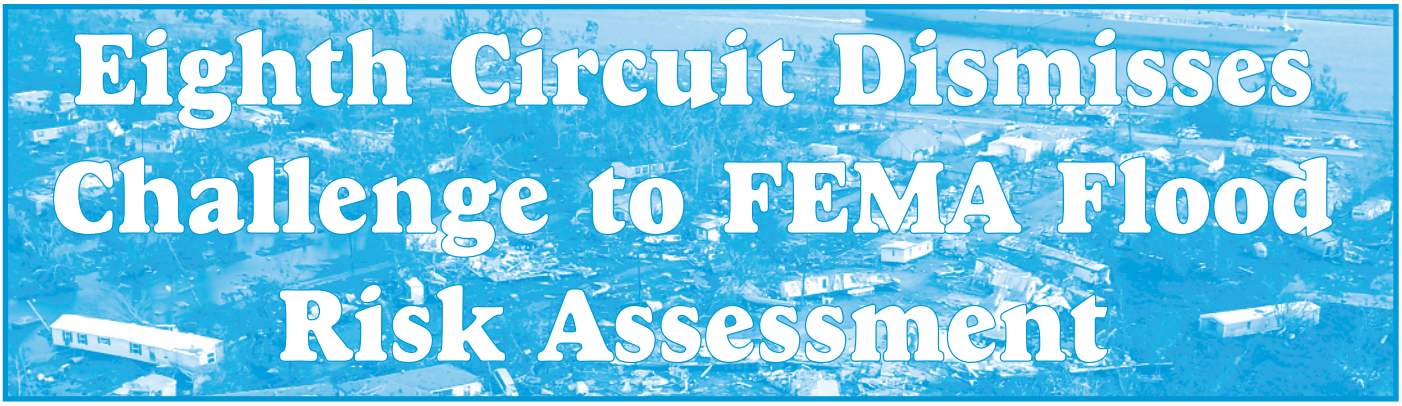
Conclusion

As NMFS continues to develop a comprehensive national policy for the development of offshore aquaculture operations in U.S. federal waters, it will examine the Gulf Plan in the context of that policy. Heavy criticism and opposition to the Gulf Plan are likely to continue as many environmental concerns surround offshore aquaculture. In addition, the Gulf Oil Spill has added another dimension to the debate. On May 25, 2010, Louisiana Senator David Vitter introduced a bill that would require a three-year study on the impacts of offshore aquaculture and delay the issuing of permits. In support of the bill, he drew attention to the Gulf Oil Spill, saying that "the marine environment … cannot handle any more stress as it begins its recovery from the ongoing oil spill."[14]

Endnotes

1. Gulf Restoration Network, Inc. v. National Marine Fisheries Service, 2010 WL 3184327 (D.C. Cir. Aug. 12, 2010).
2. Amy Lubrano, *New Developments in Gulf of Mexico Aquaculture Plan*, 29:3 Water Log 3 (2009).
3. Chris Kirkham, *Gulf of Mexico Fish Farming Pros and Cons Aired at New Orleans Meeting*, Nola.com, April 20, 2010, http://www.nola.com/politics/index.ssf/2010/04/gulf_of_mexico_fish_farming_pr.html.
4. *Gulf Restoration Network, Inc.*, 2010 WL 3184327 at *1.
5. *Id.* at *2.
6. Jonathan Proctor, *Offshore Aquaculture in the Gulf of Mexico's Federal Waters*, 28.3 Water Log 5 (2008).
7. Lubrano, *supra* note 2.
8. *Gulf Restoration Network, Inc.*, 2010 WL 3184327 at *3.
9. *Id.* at *4.
10. *Id.* at *6-7.
11. *Id.* at *7.
12. *Id.* at *10 -11.
13. *Id.* at *14.
14. Chris Kirkham, *Pointing to Gulf Oil Spill, Sen. David Vitter Files Bill to Delay Offshore Aquaculture*, Nola.com, May 25, 2010, http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/pointing _to_gulf_oil_spill_sen.html.

Eighth Circuit Dismisses Challenge to FEMA Flood Risk Assessment



Photograph taken after Hurricane Katrina courtesy of NOAA.

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In August, the United States Court of Appeals for the Eighth Circuit considered whether a challenge to the Federal Emergency Management Agency's flood risk assessment first required an administrative appeal to FEMA under the National Flood Insurance Act of 1968 (NFIA). Finding in the affirmative, the court dismissed a local group's lawsuit over FEMA's reclassification of a flood zone in St. Peters, Missouri. In reaching its decision, the court also found that such disputes are properly litigated under the NFIA and not the Administrative Procedure Act (APA).[1] While the court never reached the underlying substantive challenges, the decision provides guidance on the proper legal avenues available for challenging a flood elevation determination.

Background

In 1968, Congress enacted the National Flood Insurance Act to authorize a flood insurance program that would make flood insurance available nationwide. The Act authorized FEMA to establish the National Flood Insurance Program. As part of the program, FEMA publishes flood insurance rate maps, which are official maps of communities "delineat[ing] both the special hazard areas and the risk premium zones applicable to the community."[2] On occasion, these maps require updating to reflect changes in the land. When updating is necessary, FEMA will issue a Letter of Map Revision (LOMR). The LOMR is a modification to a map and officially revises the map.

In December of 2006, the City of St. Peters, Missouri requested a LOMR from FEMA to reclassify a tract of land that was currently considered part of the Mississippi River floodplain.[3] St. Peters based its request on the recent construction of a new urban levee designed to protect the city from a 500-year flood. In essence, St. Peters sought a zone change under the NFIP from its current AE Zone (100-year flood zone) to an X Zone (500-year flood zone, or 100-Year Flood Zone with flood control structure protection). Though FEMA expressed concern about the levee's ability to protect against floods, it issued the proposed LOMR. In accordance with public notice requirements, FEMA published the LOMR twice in the local newspaper and once in the *Federal Register*.[4]

In September 2008, the Great Rivers Habitat Alliance and the Adolphus A. Busch Revocable Living Trust (collectively Great Rivers) sent the city of St. Peters a letter pointing to deficiencies in the levee. The letter expressed concern about the levee's closure structure and the level of its freeboard. Closure structures are required at all openings of a levee.[5] Freeboard, a factor of safety usually expressed in feet above a flood level, is not required by the NFIP, but communities are encouraged by FEMA to adopt at least a one-foot freeboard to compensate for factors that may increase the flood height.[6] Freeboard requirements result in higher elevations for structures. St. Peter's forwarded the letter to FEMA. However, FEMA determined that the letter was unwarranted and made St. Peter's LOMR official. Once the LOMR was official, the flood insurance rate map was revised, reclassifying the tract of land from the special flood hazard area zone to a zone that was protected by a flood control structure.

In December 2008, Great Rivers sued FEMA asking the district court to 1) declare that FEMA had based the LOMR decision on flawed scientific and technical information and upon an inadequately designed and constructed levee; 2) vacate FEMA's LOMR determination; 3) permanently enjoin FEMA from issuing the LOMR until St. Peter's levee meets National Flood Insurance Act standards; and 4) award fees and costs. Before reaching Great Rivers' substantive claims, the district court first considered FEMA's motion to dismiss for lack of subject matter jurisdiction. Agreeing with FEMA, the lower court held that Great Rivers failed to exhaust its administrative

remedies under the National Flood Insurance Act (NFIA) and dismissed the case.[7] Great Rivers appealed the decision to the Eighth Circuit. On appeal, the court first determined that the NFIA waives FEMA's sovereign immunity from legal challenges to flood elevation determinations. Having dispensed with that issue, the court then turned to whether the APA or the NFIA allowed Great Rivers to proceed with its challenge in this instance.

APA v. NFIA

To evaluate whether the case should be litigated under the APA or NFIA, the court found it necessary to consider whether FEMA's decision to issue the LOMR was a flood elevation determination. The court recognized that the revisions to the LOMR involved a decrease in flood zone from Zone AE to Zone X. FEMA's act of revising the flood insurance rate map to move the land from Zone AE to Zone X was identical to changing the base flood elevation from its previous level to zero. Therefore, the adjustment was a flood elevation determination and was properly litigated under the NFIA. The APA only grants judicial review of final agency action in cases "for which there is no other adequate remedy in a court."[8] The court determined that the lower court did not err in dismissing Great Rivers' APA claim because the NFIA provided an adequate legal remedy.[9] Having determined that the case was properly litigated under the NFIA, the court proceeded to assess Great Rivers' claim.

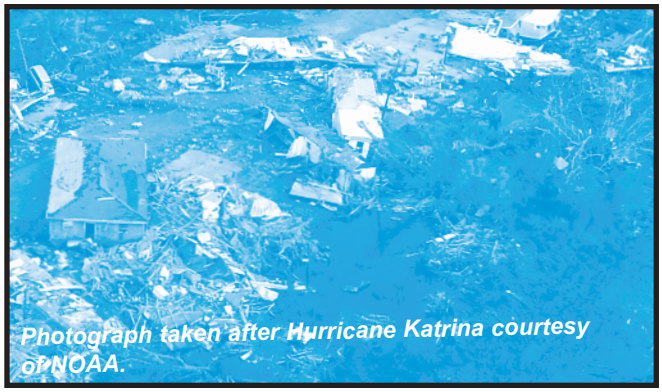
The letter from Great Rivers contesting the LOMR was grounded on two facts – the levee lacked a closure structure and the sufficiency of freeboard. The letter was accompanied by a table of data that came from FEMA's own files. The court agreed with the lower court that in order to properly appeal the LOMR under the NFIA, Great Rivers should have submitted *new certified* scientific or technical information so that FEMA could conduct another analysis based on the new information. FEMA was not required to reanalyze its own existing data. The Eighth Circuit determined that the lower court did not err when concluding that it lacked jurisdiction because Great Rivers failed to exhaust their administrative remedies by filing a proper appeal with FEMA.[10]

Conclusion

This ruling is of particular interest to residents of coastal areas, such as in Louisiana and Mississippi. FEMA has been wrong in the past about its published flood risk data in these coastal states.[11] Prior to Hurricanes Katrina and Rita, FEMA was in the process of conducting a coastal study on hurricane storm flooding. Unfortunately, Hurricanes Katrina and Rita hit land before FEMA issued its findings. The storm surges from the hurricanes far exceeded the base flood elevation levels that FEMA had published, raising questions about the validity of its flood risk data. In response, FEMA conducted a major reassessment of its flood risk data. FEMA found that the actual risk of flooding far exceeded the previously published flood risk.[12] After Mississippi was devastated by Hurricane Katrina, the state made efforts to update its flood insurance rate maps. The Mississippi Flood Map Modernization Initiative (MFMMI) is the state's effort to develop reliable digital flood hazard maps and data for every county in Mississippi. MFMMI plans to have new preliminary maps for every county by the end of the year.[13]

Endnotes

1. Great Rivers Habitat Alliance v. FEMA, 2010 WL 3168368 (8th Cir. Aug. 12, 2010).
2. 44 C.F.R. § 59.1.
3. *Great Rivers Habitat Alliance*, 2010 WL 3168368 at *1.
4. *Id.* at *2.
5. 44 C.F.R. § 65.10.
6. FEMA, National Flood Insurance Program, http://www.fema.gov/plan/prevent/floodplain/nfipkeywords/freeboard.shtm.
7. *Great Rivers Habitat Alliance*, 2010 WL 3168368 at *2.
8. 5 U.S.C. § 704.
9. *Great Rivers Habitat Alliance*, 2010 WL 3168368 at *3.
10. *Id.* at *4-5.
11. U.S. Gov't Accountability Office, GAO-07-169, National Flood Insurance Program: New Processes Aided Hurricane Katrina Handling, but FEMA's Oversight Should be Improved (2006).
12. *Id.*
13. Fed. Emergency Mgmt. Agency, Mississippi MMMS, Business Plan Summary (2007).



Photograph taken after Hurricane Katrina courtesy of NOAA.

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