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Florida's Oyster Industry Continues to Struggle

Also

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Cover photograph of oysters in Cekar Key, Florida, courtesy of Paul Schwartz.

Contents photograph of a beach-view in Biloxi, MS, courtesy of Chet Blong.

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Florida's Oyster Industry Continues to Struggle

Catherine M. Janasie



Photograph of fishermen oystering in Apalachicola Bay in Florida, courtesy of the Florida Fish and Wildlife Conservation Commission.

Continuing a recent trend, Florida's oyster industry in Apalachicola Bay continued to struggle in the 2013 season. Due to decreased water levels, oyster landings on Florida's west coast declined by almost 60 percent, with reduced revenues of 44 percent. As a result, in August 2013 U.S. Secretary of Commerce Penny Pritzker declared a commercial fishery failure for the fishery's 2012–2013 winter fishing season, citing excessive drought conditions in Apalachicola Bay and other areas of the Florida panhandle.¹

While there may be multiple causes for the decline of oysters in the area, Florida officials believe drought is a contributing factor. Oysters need the correct mixture of salt and fresh water to survive, and changes to the water level of an area, including drought, affect the salinity of the water. The decline of oysters in the Apalachicola Bay has impacted the surrounding region, as the oyster industry directly or indirectly effects up to 2,500 jobs in the area.²

Because so many residents in Florida's panhandle rely on the oyster industry for their livelihood, Florida officials are concerned about both the short- and long-

term effects of the industry's decline. In October, Florida Governor Rick Scott requested a disaster declaration from the U.S. Small Business Administration based on the historic decline in the amount of oysters in Apalachicola Bay. The Small Business Administration granted this request and has made low-interest economic injury disaster loans available to certain small businesses, cooperatives and non-profits in Franklin, Gulf, Liberty and Wakulla counties that have been affected by the oyster industry's decline since January 2012. If an entity qualifies, it can request a low-interest loan of up to \$2 million, depending on the entity's size and financial resources, and the application deadline for the loans is July 31, 2014.³

Tri-State Water Wars Continue

In an attempt to address the long-term viability of the industry, the State of Florida filed a lawsuit this fall against the State of Georgia. The lawsuit seeks injunctive relief from Georgia's upstream water use. The newly filed lawsuit is another chapter in the fight between Georgia, Florida and Alabama (the Tri-State Water Wars)

over Georgia's use of water for the Atlanta area.⁴ Florida officials assert that Apalachicola Bay needs more freshwater from Georgia and believe the bay needs increased water flow from Lake Lanier, a lake created by the completion of Buford Dam.

Located north of Atlanta, the U.S. Army Corps of Engineers (the Corps) built Buford Dam across the Chattahoochee River and created Lake Lanier. North Georgia uses the dam and reservoir for many uses, but as time has gone by, the Corps and Georgia began increasing their withdrawals from Lake Lanier for municipal water supply to accommodate the growing population of Atlanta. These increased withdrawals have led to years of negotiations and lawsuits between Georgia, Alabama and Florida. In particular, Alabama and Florida have questioned whether the Corps could reallocate the dam's conservation storage to municipal withdrawals.

In 2009, the U.S. District Court for the Middle District of Florida ruled against Georgia's attempts to increase its withdrawals from Lake Lanier, but both the Corps and Georgia appealed this decision. In 2011, the Eleventh Circuit reversed the lower court's decision and found that documents from the development of the Buford Dam and the Apalachicola-Chattahoochee-Flint River Basin (ACF River Basin) supported using the dam for municipal water withdrawal, as well as increasing those withdrawals to serve a growing population.⁵ The court ordered the Corps to decide how to balance its responsibility between using the reservoir for hydroelectric power and water storage, reconsider Georgia's request for increased water withdrawals and finalize allocation plans for the ACF River Basin within one year.⁶

In 2011, the Eleventh Circuit denied a request to rehear the case,⁷ and in 2012, the U.S. Supreme Court denied Alabama, Georgia and Southeastern Federal Power Customers, Inc. petitions to hear the case.⁸ In June 2012, the Office of the Chief Counsel of the Corps issued a legal memorandum on the Corps' authority to provide for municipal and industrial water supply from Lake Lanier and Buford Dam.⁹ In this memorandum, the Office of the Chief Counsel reversed its previous position and concluded that the Corps had the legal authority to decide whether to exercise its discretion to alter its operation of Buford Dam to accommodate Georgia's request concerning water supply withdrawals and return flows.¹⁰

Florida Seeks Help from U.S. Supreme Court

In October 2013, Florida filed a motion with the U.S. Supreme Court asking the Court to allow Florida to bring a case against Georgia, claiming that Georgia's storage and consumption of water was threatening the Apalachicola Region's biological and economic health. The Supreme Court has the jurisdiction to hear disputes between two states and has taken some cases in the past to resolve disputes between states concerning the use of water through the doctrine of equitable apportionment.¹² Pursuant to this doctrine, the Court can resolve the rights of disputing states to use an interstate stream.¹³ The Court has stated that equitable apportionment is a flexible doctrine and it will consider all relevant factors in a case, as well as the harms and benefits to each state, so that a just result is reached.¹⁴

Florida wants the Court to take its case to equitably apportion the ACF River Basin and to enjoin Georgia from preventing an adequate flow of water into Florida's Apalachicola Region. In the filing, Florida argues that its claim clearly fits within the Court's jurisdiction to hear interstate water disputes between two states since the dispute between the two states is "an actual, existing, and ongoing dispute" and Georgia has caused Florida to suffer a direct, immediate and irreparable injury.¹⁵ Florida also emphasized that both previous court cases and non-judicial negotiations between the states have failed to settle the controversy surrounding how to manage the ACF River Basin, and thus, argues that the Supreme Court is the only forum to resolve the dispute.¹⁶

At the end of January 2014, Georgia filed its opposition to Florida's motion, stating that Florida had "brought its case against the wrong party, in the wrong court, and at the wrong time."¹⁷ In particular, Georgia challenges the Court's authority to hear the case. First, Georgia argues that at best the lawsuit is premature because whether the amount of water flowing to Florida is adequate cannot be determined until the Corps finishes updating its water manual for the ACF River Basin. Further, Georgia claims that Florida has failed to sufficiently show that it has suffered harm to its sovereign rights and has not adequately alleged harm or tied its alleged injuries to Georgia's water consumption.

Conclusion

Florida will now have a chance to respond to Georgia's brief and try to convince the Court to hear the case. Whether the Supreme Court will take the case remains to be seen. One thing that is certain is that the unresolved Tri-State Water Wars will continue on, and Georgia and Florida are likely to continue to disagree on the most just way to share the ACF River Basin. 🐦

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Endnotes

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6. *Id.* at 1200-01.
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10. *Id.* at 2.
11. *Florida v. Georgia*, Brief in Support of Motion for Leave to File a Complaint, at 2.
12. See *Virginia v. Maryland*, 540 U.S. 56 (2003), *New York v. New Jersey*, 283 U.S. 336 (1931).
13. *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982).
14. *Id.* (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)).
15. *Florida v. Georgia*, Brief in Support of Motion for Leave to File a Complaint, at 2.
16. *Id.* at 22-26.
17. *Florida v. Georgia*, No. 142, Orig., State of Georgia's Opposition to Florida's Motion for Leave to File a Complaint, at p. 2.



Photograph of a bird on an oyster bar in St. Augustine, Florida, courtesy of John Stavely.

Dealing with the Dead Zone: District Court Forces EPA to Decide Whether to Regulate Nutrient Pollution in the Mississippi River

Cullen Manning

Photograph of the Gulf of Mexico, courtesy of Cesar Harada.

Pollution continues to threaten aquatic life in the Gulf of Mexico. The vast majority of people are aware of the effects the BP oil spill had on wildlife in the Gulf. The media commonly depicts pelicans and dolphins covered in crude oil to show the extensive damage that resulted from the tragic event. But what about the aquatic wildlife that dwells beneath the surface?

The pollution from the Mississippi River has created what is known as a “dead zone” in the Gulf.¹ Dead zones are areas on the bottom of the ocean where aquatic life cannot grow. As the Mississippi River floods during the rainy season, it takes with it the surrounding topsoil that contains fertilizers and manure produced by large farms. These substances contain an excess amount of nitrogen and phosphorus that are swept away with the soil and travel down river.

When these nutrients enter the Gulf, they fertilize algae. Like a home garden, the fertilizer causes the algae to grow and multiply faster than normal, which uses a vast amount of oxygen. In fact, the algae use so much oxygen that no other life can sustain itself at the bottom of the Gulf, thus forming the dead zone.²

Gulf Restoration Network’s Petition to the EPA

In 2008, a collection of environmental advocacy non-profit organizations (collectively the Gulf Restoration Network) filed a rulemaking petition with the Environmental Protection Agency (EPA) explaining the need to regulate nitrogen and phosphorus pollution in the Mississippi River.³ Under the Clean Water Act, states are initially responsible for regulating non-point source pollution, such as runoff from agricultural fields.⁴ Unfortunately, there is very little incentive for upstream states to expend time and money to control nonpoint source pollution as most of the benefits of regulation are accrued by downstream states.

In its petition, Gulf Restoration Network claimed that the states have not effectively regulated nutrient pollution. They argue, therefore, that the burden falls on the EPA to establish guidelines under §303(c)(4)(B) of the Clean Water Act.⁵ Pursuant to this section, the EPA Administrator is responsible for preparing and publishing regulations for new water quality standards “in any case where the Administrator determines that a revised or new standard is necessary...”⁶ Gulf Restoration Network reasoned that since the states had

failed to create effective regulations and the EPA recognized the issue but had taken no action, it was the EPA's responsibility to impose water quality standards.

In 2011, the EPA denied the Gulf Restoration Network's petition.⁷ Though the EPA acknowledged the need to address nitrogen and phosphorous pollution, it did not believe that federal regulations would be the most effective way to solve the problem. Instead, the EPA claimed that continued, coordinated efforts with the states would be more effective.

Lawsuit Against the EPA

Disappointed with the result of their petition, the Gulf Restoration Network sued the EPA in a Louisiana federal court. They claimed that the EPA's denial of their petition violated the Administrative Procedure Act because the EPA failed to explain why new water quality standards were not necessary to meet the requirements of the Clean Water Act, and that the EPA's decision to deny the petition was arbitrary, capricious, and an abuse of discretion.⁸

The Gulf Restoration Network drew upon *Massachusetts v. EPA* in making its argument.⁹ In *Massachusetts*, the EPA denied a rulemaking petition that requested the EPA to regulate greenhouse gas emissions under the Clean Air Act.¹⁰ The EPA denied the petition, claiming that federal regulations would interfere with administrative priorities such as the President's ability to negotiate with other countries on climate change.¹¹ The Supreme Court was not convinced by the EPA's reason for denying the rulemaking petition. In particular, the Court was not satisfied that the EPA's policy concerns related to whether greenhouse gas emissions contribute to climate change were legitimate enough reasons to deny the petition. Despite the EPA's policy concerns, the Supreme Court decided that a "necessity determination," an explanation as to why the EPA failed to act, must be made in response to the EPA's denial.¹² In other words, the Court did not order the EPA to act a certain way on the petition but did require the EPA to either issue a rule or explain why a rule was not needed within the context of the Clean Air Act.

In the present case, the Gulf Restoration Network argued that by not making a necessity determination, the EPA had improperly denied its rulemaking petition. The district court was persuaded by the Gulf Restoration Network's reliance on *Massachusetts* and ruled that the EPA

"must determine within six months whether numeric nutrient criteria are needed for the states in the Mississippi River Basin and the northern Gulf of Mexico."¹³ It is important to note, however, that the court went on to state that the EPA did not have to base the necessity determination entirely on scientific data, a position advanced by the Gulf Restoration Network. Rather, the EPA had discretion to include policy considerations within the prescriptions of the Clean Water Act.

Conclusion

Federal regulation by the EPA of nutrient pollution in the Mississippi River could have massive ramifications on the agriculture industry. The Mississippi River watershed is the second-largest watershed in the world,¹⁴ and a massive federal regulatory scheme would be time consuming and costly for the EPA to enforce. Still, the damage done to the Gulf continues to escalate everyday. Without some method to provide states with an incentive to regulate nutrient pollution, federal regulation might be the only way to bring back life to the dead zone. A spokesperson from the Justice Department speaking on behalf of the EPA indicated that the district court decision is being reviewed.¹⁵ 

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Endnotes

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2. *Id.*
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4. *Id.* at *1.
5. *Id.* at *2.
6. *Id.*
7. *Id.*
8. *Id.* at *3.
9. *Id.* at *5.
10. *Massachusetts v. E.P.A.*, 549 U.S. 497, 127 S. Ct. 1438, 1440, 167 L. Ed. 2d 248 (2007).
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15. *Id.*

Regulating Water Withdrawals on the Mississippi Gulf Coast

Niki L. Pace



Photograph of Long Beach, MS, courtesy of Morgan Harrison.

In January, the Mississippi Supreme Court considered the regulation of groundwater withdrawals by two public water utilities in Harrison County, Mississippi. In particular, the Court considered the legal standard for evaluating a groundwater withdrawal permit under Mississippi law and whether a local water utility had the exclusive right to groundwater withdrawals for public water purposes within a certain geographic area.

Background

Following Hurricane Katrina, the Mississippi Gulf coast has worked hard to improve resilience in many ways, including improvements to water, wastewater, and stormwater infrastructure. In 2006, Mississippi passed the Mississippi Gulf Coast Region Utility Act to consolidate water services “in order to reduce costs, promote resilience in the event of a disaster, improve the quality of the natural environment, and improve the planning and delivery of quality water, wastewater and stormwater services” for the Gulf coast.¹ The Act led to the creation of the George, Hancock, Harrison, Jackson, Pearl River, and Stone County Utility Authorities.

At the same time, the Mississippi Gulf Region Water and Wastewater Plan (the Plan) was being developed by the Mississippi Engineering Group (MEG). The Plan identified and prioritized the Gulf’s most critical water infrastructure needs. The Plan included two Harrison county projects at issue in this litigation – W-13 and W-15. W-13 would create a water supply system for “the area north of I-10, the DeLisle Community, and the cities of Pass Christian and Long Beach.”² W-15 would create a water system for “Lorraine-Cowan Road area in North Gulfport to Lyman Community.”³ The Harrison County Utility Authority (HCUA) oversaw the design of the two projects.

The designs for W-13 and W-15 included portions of Riverbend Utilities’ (Riverbend) service area. Riverbend is a privately owned, public utility company that was granted the exclusive right “to provide water services and wastewater treatment within an approximate twenty-three square mile area generally centered at the intersection of County Farm Road and Highway 53 in Harrison County” by the Mississippi Public Service Commission pursuant to a certificate of public necessity and convenience.⁴

Riverbend objected to HCUA's groundwater withdrawal permit request to the Mississippi Department of Environmental Quality (MDEQ) to place two wells on land that HCUA owned but was located within Riverbend's service area for the W-13 and W-15 projects. MDEQ held a full evidentiary hearing related to the permit authorizations with testimony from MDEQ, HCUA, and Riverbend. Ultimately, the Permit Board approved HCUA's groundwater withdrawal permits. Riverbend appealed to the Harrison County Chancery Court, which also affirmed the Permit Board's decision. Riverbend then appealed the ruling to the Mississippi Supreme Court, leading to this decision.

Mississippi Groundwater Withdrawals

Groundwater withdrawal permits in Mississippi are governed by several statutory provisions. Mississippi's state policy on the conservation of water resources can be found in § 51-3-1 of the Mississippi Code which provides that state water resources be used for the beneficial use of the Mississippi citizens, and calls for the prevention of waste and unreasonable use and the conservation of water.⁵ Another section of the law addresses water ownership in Mississippi and provides:

Use of waters of the state shall not constitute absolute ownership or absolute rights of use of such waters, but such waters shall remain subject to the principle of beneficial use.... If it is determined that the proposed use of the water sought to be permitted is not for beneficial purposes, is not consistent with standards established by the commission, or is detrimental to the public interest, it shall be the duty of the board to enter an order rejecting such application or requiring its modification.⁶

The Permit Board has developed several groundwater regulations to evaluate groundwater withdrawal requests. The regulation addresses the application process, priorities of groundwater use, well spacing, volume of water required, and certain non-beneficial uses. However, the regulations do not address need, population growth, or efficiency. In evaluating HCUA's permit request, the Board considered: (1) ownership of the land where the wells will be located, (2) how the water will be used, (3) amount of water requested, (4) well spacing, and (5) the projected drawdown of the aquifer.

In this case, the Permit Board found these criteria favored permitting HCUA's request, specifically noting that the aquifer drawdown would not interfere with Riverbend's existing wells. The HCUA wells were also not expected to have any "material adverse effect on the availability of water in the aquifer."⁷ On appeal, the Court upheld the Permit Board's decision noting that it was supported by the majority of the evidence introduced during the evidentiary hearing.

Certificate of Public Necessity & Convenience

Riverbend also argued that allowing HCUA's wells violated its exclusive right to provide water services within a specified geographical area. However, as the Court clarified, Riverbend's certificate gives it "only the exclusive right to sell water in its certificated area."⁸ Riverbend does not have the exclusive right to access all groundwater underlying the area. HCUA will not be selling water in Riverbend's certificated area and therefore is not violating Riverbend's exclusive right to sell in that area.

Conclusion

The Mississippi Supreme Court's affirmation of the HCUA groundwater withdrawal permits will clear the way for the W-13 and W-15 projects to move forward. The dispute has been ongoing for many years, delaying implementation of improved water services to the two project areas. With this matter finally resolved, coastal residents in the project areas can anticipate improved water supply and infrastructure as the projects are instituted. 🐼

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Development of Offshore Wind in the United States and Gulf of Mexico: 2013 Update

Catherine M. Janasie

Since President Obama took office, the Obama Administration and the U.S. Department of the Interior (DOI) have made the permitting of offshore wind a priority. In his recently released Climate Action Plan, President Obama stressed the importance of reducing greenhouse gas emissions and developing renewable energy. During the President's first term, the U.S. doubled its electricity generation from wind, solar, and geothermal energy, and the plan sets the goal of doubling the nation's renewable energy generation again by 2020.¹ The President's plan also affirms the administration's focus on accelerating the permitting of clean energy projects.

However, despite the potential for offshore wind, the U.S. has yet to install an offshore wind farm. In 2001, Cape Wind Associates, LLC began the process for developing the first offshore wind farm in the U.S. off the coast of Massachusetts in federal waters. Thirteen years later, due to regulatory hurdles and litigation, the project still has yet to begin construction. In response to Cape Wind's regulatory delay, DOI has taken steps to accelerate the permitting and construction of offshore wind facilities. This past year, DOI continued to push for the development of offshore wind energy off the nation's coasts.

Federal Smart from the Start Initiative

With the hope of speeding up the approval process for offshore wind projects in federal waters, DOI announced its Smart from the Start Initiative in November of 2010.² The program attempts to accelerate the regulatory process through designating appropriate areas for projects, coordinating environmental studies, using large-scale planning, and expediting the approval process. In addition to developing renewable energy, DOI has stated that the initiative's goals include strengthening national security, generating jobs in the U.S., and reducing carbon emissions.³

As part of the Smart from the Start process, DOI's Bureau of Ocean Energy Management (BOEM) can designate Wind Energy Areas (WEAs), through which the agency can identify areas with the best renewable energy potential and the least amount of conflicts with other uses like shipping routes and wildlife habitats. The WEA process allows for the participation of other federal agencies, and the information provided by these agencies can be used to either encourage or avoid renewable energy projects in identified areas. As part of the WEA program, BOEM will also undertake regional environmental assessments.⁴

In addition to developing renewable energy, DOI has stated that the initiative's goals include strengthening national security, generating jobs in the U.S., and reducing carbon emissions.

Under the Smart from the Start Initiative, BOEM has taken several steps to aid the development of offshore wind projects. The bureau has designated WEAs in Rhode Island, Massachusetts, New Jersey, Delaware, Maryland, and Virginia. On February 2, 2012, DOI announced that it had completed its environmental review under the National Environmental Policy Act for the WEAs off the coasts of Maryland, Virginia, New Jersey, and Delaware.⁵



Former Secretary of the Interior Ken Salazar approving the Cape Wind project in 2010, courtesy of the Office of Governor Deval Patrick.

2013 Federal Developments

In June 2013, DOI announced that it would hold its first offshore lease sale at the end of July 2013 for two leases in the Rhode Island and Massachusetts WEAs. The lease sale was open to nine previously approved bidders, generated \$3.8 million in high bids, and was won by Deepwater Wind New England, LLC.⁶ DOI held a second auction on September 4, 2013 for 112,799 acres off the coast of Virginia. Virginia Electric and Power Company won the bid and the sale received \$1.6 million in high bids. Finally, on December 17, 2013 DOI announced that it would hold a lease sale for offshore wind projects for 80,000 acres off the coast of Maryland.⁷ The lease will have two separate lease areas, with a North Lease Area of 32,737 acres and a South Lease Area of 46,970 acres, and the auction is expected to occur sometime in 2014.

The long-delayed Cape Wind project, which is planned for 130 wind turbines located 5 miles offshore, also saw some progress in 2013.⁸ On December 23, 2013, Cape Wind signed a contract with the German company Siemens AG for the construction of the turbines and transformer, as well as maintenance services, for the project.⁹ This contract is a key step towards commencing

construction and it could also qualify the project for an investment tax credit that expired at the end of 2013. Since Congress has yet to extend the tax credit for 2014, Cape Wind would have had to meet certain thresholds in 2013 to qualify for the credit, and the Siemens contract could have helped the project do so. Further, the Cape Wind project won another battle as the U.S. Court of Appeals for the District of Columbia recently upheld the Federal Aviation Administration's determination that the project would not be a hazard to the area's air navigation.¹⁰

After winning BOEM's July auction for lease areas off the coasts of Rhode Island and Massachusetts, Deepwater Wind New England, LLC also believes that its Block Island Wind Farm met the requirements for qualifying for the tax credit before the end of 2013.¹¹ The project is planned off the coast of Rhode Island in deeper waters, where there is stronger wind. The Block Island Wind Farm is a 30-megawatt project that will cost \$300 million to construct, with construction projected to start in 2015. The company also has a larger 1 gigawatt project planned that would be located 15 miles off the coast of Massachusetts and could cost \$5 billion to construct. Construction on that project is not expected to begin until 2017.



Photograph of a wind turbine in Sweetwater, TX, courtesy of BBC World Service.

Potential Texas Project

In addition to federal programs, individual states can also decide to lease areas off their coasts in state waters for offshore projects. For these projects, the state will govern the leasing process for the submerged lands in state waters, which allows the projects to by-pass the federal leasing process. Many believe that this will allow projects to move through the development process more swiftly. However, these projects will still be subject to additional regulation from the state and federal governments and will face some financial hurdles.

The State of Texas is aggressively pursuing the development of offshore wind off of its coast.¹² The Texas General Land Office (GLO) has granted two separate leases off the coast of Texas to Baryonyx

Corporation for the company's Rio Grande Project. GLO granted the first lease for 19,794 acres to Baryonyx in July 2009 and the second lease for 21,672 acres in August 2010. The company thinks each site could house 160 wind turbines, with the potential to produce 1 gigawatt of energy on each site.¹³ The company also states that it is pursuing traditional power purchase agreements to sell the energy from the project, and the project has received some initial funding from the U.S. Department of Energy.¹⁴ It is important to remember, however, that leasing is just the first step in the development process for offshore wind projects. The Rio Grande Project likely still has many hurdles to overcome before construction on the project can begin.

In addition federal programs, individual states can also decide to lease areas off their coasts in state waters for offshore projects.

Conclusion

As 2013 shows, both the Obama administration and DOI continue to push the development of offshore wind energy. However, Congress has yet to extend the expired tax credits for offshore wind projects, which could hurt the financing of these projects. Further, a lot of regulatory hurdles remain for a project planned in federal waters. For this reason, some believe that the first offshore wind project will actually be a project in state waters, and Texas is making a push to install the first offshore wind project in the nation. Though the Barynoyx Rio Grande Project has already secured leases from the GLO, it still has a lot of steps to get through before construction on the project can begin. Therefore, states and companies are still awaiting to see where the nation's first offshore wind facility will be installed. 🐼

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3. U.S. Dep't of the Interior, Frequently Asked Questions: Smart from the Start Atlantic OCS Offshore Wind Initiative, <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=73317> (last visited July 19, 2012) [hereinafter Smart from the Start FAQs]. As part of the Smart from the Start initiative, DOI will also move to "aggressively" process applications for offshore transmission lines. *Id.*
4. *Id.*
5. BUREAU OF OCEAN ENERGY MANAGEMENT, COMMERCIAL WIND LEASE ISSUANCE AND SITE ASSESSMENT ACTIVITIES ON THE ATLANTIC OUTER CONTINENTAL SHELF OFFSHORE NEW JERSEY, DELAWARE, MARYLAND, AND VIRGINIA: FINAL ENVIRONMENTAL ASSESSMENT iii (2012), available at http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Smart_from_the_Start/Mid-Atlantic_Final_EA_012012.pdf [hereinafter Atlantic OCS Final EA].
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Flood Insurance Reform: Mississippi Sues FEMA Over Policy Changes

Niki Pace

Photograph of Biloxi, MS after Hurricane Katrina, courtesy of Karl Bedingfield.

Late last September, the Mississippi Insurance Commissioner filed suit against the U.S. Department of Homeland Security and the Federal Emergency Management Agency (collectively referred to as FEMA) essentially seeking to halt rate increases mandated by congressionally enacted flood insurance reform. Since that time, Mississippi's lawsuit has been joined by Florida, Alabama, Massachusetts, South Carolina, Louisiana, a local Mississippi county, and the Mississippi Windstorm Underwriting Association. At issue is whether the economic impacts and affordability of these reforms should have been taken into account prior to initiating rate changes.

History of NFIP and the Biggert-Waters Act

At center stage in this litigation is the National Flood Insurance Program (NFIP) and key provisions of the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12). The NFIP is a federally subsidized program created by the National Flood Insurance Act in 1968. In creating the program, Congress recognized that it was uneconomical for the private insurance industry to provide flood insurance and sought to create a nationwide program that could take advantage of "workable methods of pooling risks, minimizing costs, and distributing burdens equitably among those who will be protected by flood insurance and the general public."²¹ The program was designed to "promote the public interest by providing appropriate protection against the perils of flood losses and encouraging sound land use by minimizing exposure of property to flood losses."²²

FEMA administers the NFIP through a partnership with private insurance companies. Communities qualify to participate in the NFIP by adopting federally set minimum standards for floodplain management, often through land use regulations and building code requirements. The NFIP rewards communities that exceed the minimum standards for managing flooding risks by offering discounts on flood insurance through the Community Rating System.

In 2012, Congress passed BW-12 as part of a larger measure that included transportation funding and the Restore Act – a bill that sends a portion of Clean Water Act penalties from the Deepwater Horizon oil spill back to the Gulf states. BW-12 reauthorized the NFIP for five years and included measures designed to move the cash-strapped NFIP out of the red and into the black. The NFIP had been operating at a loss for years and BW-12 sought to adopt reforms aimed at improving the solvency of the program.

The BW-12 made three substantial changes to the flood insurance rates: (1) new policies will be issued at full-risk rates, (2) subsidies will be phased out, and (3) grandfathered rates will be phased out. Changes to new policies began last year and FEMA started phasing out subsidized flood insurance rates for vacation homes in January 2013. On October 1, 2013, FEMA began phasing out subsidized flood insurance rates for business properties and severe repetitive loss properties that are Pre-FIRM. A property is considered Pre-FIRM if it was built before December 31, 1974 or before the area adopted its first Flood

Insurance Rate Map (FIRM). These properties have, until now, received a subsidized rate.

As BW-12 implementation got underway, stories of extreme rate hikes for select properties began to surface. Public outcry and calls for reform quickly followed. Numerous proposals to reform BW-12 have been introduced in Congress but have seen little movement. Unless changes to the law are made, the elimination of subsidies and grandfathering prescribed by BW-12 will happen. The question has become a matter of when and how the changes will take place.

State Arguments

Through this litigation, the Mississippi Insurance Department (MID) seeks to stop flood insurance rate hikes brought on by BW-12, what MID characterizes as “an oncoming economic disaster to Mississippi citizens” and others living in the flood zone.³ In simple terms, MID is arguing that BW-12 required FEMA to conduct studies, including an affordability study, before instituting the rate changes also required by BW-12. As noted by the briefs of other states, BW-12 imposed set deadlines for study completions but gave FEMA more timeline flexibility for initiating some of the rate changes. The studies, due to Congress 270 days after passage of the Act (April 2013), are incomplete. For that reason, MID requested the court stop FEMA from carrying out flood insurance rate increases until the studies are completed. FEMA, not surprisingly, disputes this interpretation of BW-12, maintaining that the rate changes and the studies are two parallel requirements imposing independent obligations on the agency.

Does MID have Standing?

At this phase of the litigation, the critical question is whether MID has standing to bring this suit in the first place. FEMA has argued that MID does not meet Article III standing requirements because MID has neither established the requisite injury in fact nor shown that its claims are redressable by the court in the event of a favorable ruling.

Through briefs, MID has responded with a detailed assertion of standing both in its own capacity and on behalf of the citizens of Mississippi under the doctrine of *parens patriae*. Under *parens patriae*, the state is acting

in its quasi-sovereign capacity and suing on behalf of its citizens as a whole. In particular, MID asserts the following grounds for standing: (1) FEMA failed to complete the studies, (2) FEMA failed to consult with MID before instituting rate changes, (3) FEMA’s actions impacted MID’s zone of interest, i.e. the Commissioner’s rights to consultation, (4) impacts on Mississippi policyholders violated MID’s quasi-sovereign interest under *parens patriae*, and (5) FEMA’s violations of the federal statute impaired MID’s quasi-sovereign interest under *parens patriae*. As to *parens patriae* standing, MID strived to clarify in its briefs that it is not seeking to “protect its citizens from the operation of a federal statute,” but rather, is seeking to enhance the operation of a federal program by compelling FEMA to enforce BW-12.

The issue of redressability returns us to earlier arguments. FEMA maintains that, even if the court compels the studies, the studies in and of themselves will not resolve the injuries to Mississippi policyholders because the rate increases operate independently from the study requirements of BW-12. In other words, one is not dependent on the other. As previously discussed, MID and other parties heavily dispute this interpretation of BW-12.

Conclusion

The court is several steps away from resolving the underlying questions about flood insurance rate increases under BW-12. Assuming MID has standing and the allegations satisfy APA reviewability standards, the court may consider staying aspects of the rate changes until the litigation is resolved or the studies are concluded. Hearings were held in the case in December and a ruling is expected in the near future. 🦋

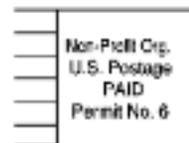
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Endnotes

1. 42 U.S.C. § 4001(d).
2. *Id.* § 4001(c).
3. First Amended Complaint, Miss. Insurance Dept. v. U.S. Dept. of Homeland Security, 1:13cv379, filed Oct. 7, 2013, at ¶ 4.



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