

# WATER LOG

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## Louisiana Extends Coastal Boundaries

*Also,*

**Congress Passes the RESTORE Act**

**Landmark MARPOL Vessel Surveyor Conviction**

**Supreme Court To Decide If Temporary Flooding is a Taking**

# WATER LOG

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## • UPCOMING EVENTS •

Restore America’s Estuaries Conference  
October 20-24, 2012  
Tampa, Florida

Coastal Development Strategies Conference  
November 7-8, 2012  
Biloxi, MS

Bays & Bayous Symposium 2012  
November 14-15, 2012  
Biloxi, MS

*Cover photograph of Louisiana coast near Gulf of Mexico courtesy of Ryan Hagerty.*

*Contents photograph of Atlantic bluefin tuna school in the Gulf of Mexico courtesy of NOAA/Marine Photobank.*

# Louisiana Extends State Coastal Boundaries in the Gulf

Josh Loring<sup>1</sup>

The Gulf of Mexico is home to a number of natural resources that provide a tremendous amount of revenue for the five states along the Gulf coast: Texas, Louisiana, Mississippi, Alabama, and Florida. With offshore natural gas production royalties and recreational and commercial fishing revenues in the billions, it is no wonder all five states have previously made efforts to increase their jurisdictional limit and control of the submerged lands lying off their respective coasts. Most recently, the Louisiana Wildlife and Fisheries Commission extended its jurisdiction over state fishing waters from three miles offshore to just over ten miles, attempting to enforce Louisiana fishing regulations in waters that are traditionally governed by federal law.<sup>2</sup> Officials based their decision on a 2011 state law that recognized Louisiana's historical authority to manage the waters and natural resources up to that distance.<sup>3</sup> However, until Congress or the courts approve the action, federal law will continue to be enforced, creating confusion among enforcement officials and citizens alike.

## The Submerged Lands Act

Following years of controversy between coastal states and the federal government, Congress recognized the need to clarify the jurisdictional limits of coastal boundaries and passed the Submerged Lands Act in 1953. The act establishes that the coastal boundary for each state will extend three geographical miles from the shore, with the federal government retaining control of submerged land seaward of that boundary.<sup>4</sup> Additionally, the Act carves out two narrow exceptions for when a state can extend its coastal boundary beyond the three-mile limit. The first recognizes the existence of a law or constitutional provision that established a seaward boundary beyond three geographical miles prior to the state becoming a member of the Union. The second simply allows for Congress to approve an extension beyond the three-mile limit. If a court finds that a Gulf state qualifies for an exception, the Submerged Lands Act limits the state's seaward boundary to a maximum of "three marine leagues into the Gulf of Mexico," which is roughly ten miles.<sup>5</sup>

## Coastal Boundaries in the Gulf

Shortly after the passage of the Submerged Lands Act, the United States brought a lawsuit asking for exclusive possession of all areas within the Gulf that extended past the three geographical mile limit established by the Act. The five Gulf States individually argued that they each qualified for one of the exceptions under the Submerged Lands Act and should be granted coastal boundaries extending three marine leagues into the Gulf. The U.S. Supreme Court was tasked with deciding whether any of the five Gulf States should be granted a seaward boundary extending beyond the three-mile limit.<sup>6</sup> The Court individually assessed each state based on the unique facts surrounding the state's history, and ultimately decided that both Texas and Florida were entitled to a ten mile coastal boundary, while Mississippi, Alabama, and Louisiana were limited to the three geographical miles set forth in the act.

In granting Texas an extended coastal boundary, the Court found that in 1836, prior to becoming a member of the Union, the Republic of Texas passed a law that defined coastal boundaries as extending three leagues (ten miles) from the land. Similarly, in granting Florida an extended coastal boundary, the Court agreed with the state's contention that prior to being admitted into the Union, the Florida constitution described its coastal boundaries on the Gulf of Mexico as extending three leagues (ten miles) from the mainland.

With no expressly written laws or constitutions establishing coastal boundaries further than three geographical miles, Mississippi, Alabama, and Louisiana relied on a somewhat different theory. All three states argued that upon being admitted to the Union, the federal government established new boundary lines that extended their rights beyond three miles, qualifying under the approval from Congress exception.

Louisiana cited language in its Act of Admission by the United States that called for its boundaries to include all islands within ten miles of the coast.<sup>7</sup> The state further argued that the area acquired by the

United States through the Louisiana Purchase should include the original extended boundary of territorial seas that had been established by France upon its initial claim of the land in 1682. Unconvinced, the Court sided with the United States, holding that the language found in the Act of Admission only included the islands themselves, not the territorial seas within ten miles. The Court further held that the initial claim by France established the mouth of the Mississippi River as the southerly limit of its claim. Similar arguments made by Mississippi and Alabama both citing language in their Acts of Admission calling for boundaries to include all islands within six leagues of the shore were also rejected by the Court for the same reasons.

### Louisiana Extends Coastal Boundaries

Despite the 1960 Supreme Court ruling, Louisiana lawmakers decided to amend the state's coastal boundaries to mirror those of Texas. In 2011, the Louisiana legislature passed Act 336. Under the new state law, Louisiana claims all the lands, minerals, and other natural resources underlying the Gulf of Mexico, extending seaward from its coastline for a distance of ten miles.<sup>8</sup> The Louisiana legislature explicitly wrote into the law that the Supreme Court's decision to establish unequal gulfward boundaries among the states has resulted in economic disparity and hardship for Louisiana citizens, as well as economic loss for the state. The law further stipulates that until acknowledged by an Act of Congress or a final non-appealable judgment in a court of law, the boundary extension will not take effect.

In June, the Louisiana Department of Wildlife and Fisheries put out a release alerting the public that a recent action from the Louisiana Wildlife and Fisheries Commission has made state regulations applicable to waters extending ten miles from the coast.<sup>9</sup> Inside the extended boundary, the Commission now claims that both residents and non-residents are required to obtain the appropriate state permits and licenses, while obeying state recreational and commercial fishing requirements.

### Opposition from Mississippi

Following Louisiana's announcement, the Mississippi Commission on Marine Resources (MCMR) unanimously passed a resolution opposing Louisiana's boundary extension, and it has submitted the resolution to the Mississippi Attorney General's Office. The MCMR found the Louisiana act to be in direct violation of Mississippi legislation that requires the

state marine patrol to enforce federal regulations in waters that fall within the new boundaries. The resolution states that this action will result in significant financial harm to the state of Mississippi and its citizens.<sup>10</sup> Some of the impacts cited by the resolution include the charter boat industry, commercial and recreational fisherman, artificial reefs, and current and future oil and gas revenues. Finally, the MCMR has directed the Mississippi Department of Marine Resources' Marine Patrol to continue enforcing federal regulations in the areas extended by the Louisiana law.

**Despite the 1960 Supreme Court ruling, Louisiana lawmakers decided to amend the state's coastal boundaries to mirror those of Texas.**

### Conclusion

State lawmakers responsible for amending the law extending Louisiana's coastal boundaries are aware of the potential legal consequences. A legal challenge in this matter could make its way to the U.S. Supreme Court. Until the amended law acquires either approval from Congress or a favorable judgment in a court of law, state agencies outside of Louisiana tasked with enforcing federal law have vowed to continue their duties in the conflicting waters.✈

### Endnotes

1. J.D. Candidate, 2013, Pace University School of Law.
2. Three marine leagues are equivalent to 9 geographical miles (6,087 ft./1.15 regular miles), and 10.357 regular miles (5,280 ft).
3. LSA-R.S. 49:1(A).
4. 43 U.S.C. § 1312.
5. *Id.* § 1301(b).
6. United States v. Louisiana, Texas, Mississippi, Alabama & Florida, 363 U.S. 1, 4-5 (1960).
7. *Id.* at 66.
8. LSA-R.S. 49-2.
9. Press Release, La. Dep't of Wildlife and Fisheries, State Regulations Applicable with the Extension of Louisiana Waters (June 19, 2012), <http://www.wlf.louisiana.gov/news/35570>.
10. Miss. Comm'n on Marine Resources, Res. 07022012-01 (July 2, 2012), <http://www.dmr.ms.gov/images/news/12-44-LST.pdf>.

# Congress Passes the RESTORE Act

Catherine Janasie<sup>1</sup>



PHOTOGRAPH OF PRESIDENT OBAMA SIGNING HR 4348. SOURCE: PUBLIC DOMAIN.

On July 6, 2012, President Obama signed the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act) into law.<sup>2</sup> Recognizing the need to fix the damage done to the Gulf Coast by the Deepwater Horizon oil spill, as well as the need to provide for long-term restoration of the region's ecosystems, the RESTORE Act will serve as a source of funding for Gulf Coast restoration efforts. The Act provides that 80% of the civil and administrative Clean Water Act penalties from the oil spill will be paid into the Gulf Coast Restoration Trust Fund (Trust Fund). The Act then lays out how the Trust Fund will be allocated to and used by each of the Gulf Coast states - Alabama, Florida, Louisiana, Mississippi and Texas.

## The Trust Fund

The RESTORE Act directs both how the Trust Fund should be divided and what activities can be funded. The RESTORE Act makes 35% of the Trust Fund available each fiscal year to the Gulf Coast states equally (with each state receiving 7%) for ecological and economic restoration in the Gulf Coast region.<sup>3</sup> Restoration projects supported by the fund include restoring and protecting coastal resources, mitigating damage to natural resources, fish and wildlife, implementing a federally approved coastal, marine or conservation management plan, creating jobs, improving the State parks affected by the oil spill and developing infrastructure projects that increase flood protection or benefit the area's economy or ecological resources. The states can also use the funds for planning assistance, to cover administrative costs and to promote tourism and Gulf Coast seafood.

The newly created Gulf Coast Ecosystem Restoration Council (the Council) will receive 30% of the Trust Fund each fiscal year. The Council will be an independent federal entity composed of the Secretaries of the Interior, Army, Commerce and Agriculture, the EPA Administrator, the head of the Coast Guard and the governors of each coastal state. The Council's main duty will be to develop a Comprehensive Plan for the Gulf Coast region to "restore and protect the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands of the Gulf Coast."<sup>4</sup> The Council's allocated funds will be used to implement the Comprehensive Plan and fund projects and programs that will restore and protect the above items covered by the Comprehensive Plan, as well as the Gulf Coast's economy.

Another 30% of the Trust Fund is allocated to the Gulf Coast states as a means to help areas that were closer to and more affected by the oil spill. Each state's allocation is calculated using a complicated formula that looks at how much of each state's coast was oiled before and after the oil spill, the nearest and farthest point of oiled shoreline from the Deepwater Horizon drilling unit and the populations of each coastal county on the Gulf of Mexico in each Gulf Coast state.<sup>5</sup> However, regardless of the outcome of these calculations, each state will be entitled to at least 5% of these funds. Before a state can receive funds, it must submit a plan to the Council outlining programs, projects, and activities to improve the Gulf Coast region's economy or ecosystems. The Act limits the types of activities that can be in a state's plan, as well as how much of the funds can be used for infrastructure projects.

The Council's main duty will be to develop a Comprehensive Plan for the Gulf Coast region to "restore and protect the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands of the Gulf Coast."

The remaining 5% of the Trust Fund will be divided between the Gulf Coast Ecosystem Restoration Science, Observation, Monitoring, and Technology Program (RSOMT Program) and the Centers of Excellence Research Grants Program, with each program receiving 2.5% of the Trust Fund.<sup>6</sup> The RSOMT program will engage in research, monitoring and observation to support the sustainability of the Gulf of Mexico's ecosystems, fish habitat and stocks and commercial, charter and recreational fishing industries. Under the Centers of Excellence Research Grants Program, the Gulf Coast states will split the available funds each year to provide grants to nongovernmental entities and consortia to set up "centers of excellence" that will research the Gulf Coast region in the following disciplines: coastal and deltaic sustainability, restoration and protection activities, ecosystem research and monitoring, commercial and economic development, offshore energy development and sustainable growth, as well as monitoring, observing and mapping the Gulf of Mexico.

### Going Forward

While the Trust Fund will be a way for the Gulf Coast states to fund coastal projects, the states will not receive the funds until the Clean Water Act claims against BP are either settled or go to trial. Estimates for how much BP will have to pay differ depending on whether BP and the federal government settle or what federal prosecutors will be able to prove in their case against BP, but estimates widely range from \$4 to \$21 billion.<sup>7</sup> While the U.S. Justice Department and BP have worked on negotiating the claims against BP related to the oil spill during the last two years, neither party has publically discussed the settlement negotiations. Once the states start receiving money from the Trust Fund, they will then face the task of determining what projects will get funding. The RESTORE Act dictates the entity in each Gulf Coast state that will determine what projects will be funded, and the Act also provides that the states can consider public input in making these determinations.<sup>8</sup>

### Endnotes

1. Ocean & Coastal Law Fellow, Mississippi-Alabama Sea Grant Legal Program; research assistance by Benjamin Sloan, J.D. Candidate 2014, Univ. of Mississippi School of Law.
2. RESTORE Act of 2012, Pub. L. No. 112-141, §§ 1601-1608.
3. *Id.* at § 1603(t)(1).
4. *Id.* at § 1603(t)(2)(D).
5. *Id.* at § 1603(t)(3).
6. *Id.* at §§ 1604-1605.
7. Chris Baltimore, *New Law on BP Spill Fines Raises Stakes for Gulf States*, REUTERS (July 14, 2012), <http://in.reuters.com/article/2012/07/14/bp-spill-settlement-gulf-idINDEE86D04J20120714>.

# Landmark MARPOL Vessel Surveyor Conviction

Rachel White<sup>1</sup>



PHOTOGRAPH OF FISHING BOAT COURTESY OF WOLCOTT HENRY 2005/MARINE PHOTOBANK.

In June, the Eleventh Circuit Court of Appeals affirmed the felony conviction of a vessel surveyor who issued a fraudulent International Oil Pollution Prevention (IOPP) Certificate in violation of both the International Convention for the Prevention of Pollution from Ships (MARPOL) and the Act to Prevent Pollution from Ships (APPS).<sup>2</sup> Hugo Pena, the defendant, claimed that the United States lacked jurisdiction to prosecute surveyors for MARPOL violations in U.S. courts. The Eleventh Circuit disagreed, and affirmed Pena's five-year probation sentence. This is believed to be the first criminal case brought in America against a MARPOL classification surveyor for failing to comply with its pollution prevention responsibilities.<sup>3</sup> It is possible that this conviction will draw further attention to the criticism levied against the MARPOL port state inspection system, which focuses on documents issued by Flag States, for potentially inviting misrepresentation on IOPP Certificates.<sup>4</sup>

## MARPOL Background

MARPOL is one of the most important international maritime treaties. It was enacted in 1973 and modified in 1978; the United States is a party, along with 152 other nations.<sup>5</sup> MARPOL was designed to eliminate the intentional pollution of the marine environment by oil or other harmful substances, and to minimize accidental discharges of such substances.<sup>6</sup> MARPOL Annex I (Annex I) is specifically concerned with preventing oil pollution from ships. Among the Annex I requirements is a prohibition on dumping bilge water into the ocean unless its oil content has been reduced to less than 15 parts per million.<sup>7</sup> Bilge water is the mixture of oil and water that collects in the bottom of a ship during the ship's normal operation, and must be pumped out regularly so that it does not endanger the safety of the vessel or its crew. In order to comply with Annex I, ships either use "oily water separators" that filter the bilge water before it is discharged into the ocean, or store the bilge water in tanks for discharge at a proper facility.

Flag States certify that ships flying under their flags are in compliance by conducting surveys and issuing IOPP Certificates. Surveyors inspect the ship on behalf of the Flag State, ensuring that its structure and equipment comply with the MARPOL Annex I requirements. Pena was the attending surveyor contracted by a classification society to issue an IOPP Certificate for the *Island Express* on behalf of the Republic of Panama. On April 15, 2010, Pena signed the IOPP Certificate for the *Island Express*, certifying that all of its pollution prevention equipment was in working order. The IOPP Certificate would have allowed the *Island Express* to set sail from Fort Lauderdale, where it was docked, and enter ports of other MARPOL signatory nations.

In 1980, the United States enacted APPS to give the U.S. Coast Guard authority to promulgate MARPOL-implementing regulations.<sup>8</sup> The Coast Guard is empowered to conduct port state control examinations to ensure that vessels entering U.S. ports comply with MARPOL. On May 4, 2010, the Coast Guard directed an unannounced inspection of the *Island Express* in a port south of Ft. Lauderdale, Florida. The Coast Guard examined the ship's IOPP Certificate and compared it to the ship's actual equipment, systems and material. Despite Pena's certification that the ship complied with Annex I, the Coast Guard examiner found that the oily water separator was non-functional; instead of proper equipment, the ship had a makeshift system of pumps and piping that released the ship's bilge water directly into the ocean. The IOPP Certificate did not indicate the pumps and piping, nor was its approval conditioned on the vessel becoming compliant by properly managing the bilge water. The U.S. Attorney for the Southern District of Florida asserted that the *Island Express* crew pumped oily waste into the ocean until the Coast Guard boarded the vessel.

### Pena's Conviction

During questioning by Coast Guard officials, Pena admitted that he certified the *Island Express* was MARPOL-compliant on the IOPP Certificate even though he knew that statement was false.<sup>9</sup> In fact, Pena had authorized the ship's chief engineer to pump bilge water directly overboard in an emergency. Following a jury trial, Pena was convicted of knowingly violating MARPOL by failing to conduct a complete survey of the *Island Express* and for making a materially false, fictitious and fraudulent statement – by certifying that the *Island Express'* equipment, systems and material were in compliance with MARPOL Annex I. Facing up to six years' imprisonment, Pena was sentenced to five years' probation.

On appeal, Pena argued that, pursuant to MARPOL, Panama had the responsibility to conduct ship surveys and issue IOPP Certificates, and therefore only Panama had jurisdiction to prosecute a surveyor for a failure to conduct a proper MARPOL inspection. The Eleventh Circuit disagreed, reasoning that the United States surrendered exclusive jurisdiction over its ports by signing MARPOL, but maintained concurrent jurisdiction to prosecute violations of MARPOL according to U.S. law. By maintaining concurrent jurisdiction, the United States can punish MARPOL violations according to U.S. law.<sup>10</sup> Furthermore, the U.S. government has well-established jurisdiction to prosecute violations of domestic law committed in U.S. ports, and the conduct at issue occurred in a Florida port. Finally, the court found nothing in MARPOL or APPS to suggest that the United States surrendered concurrent jurisdiction over foreign-flagged ships docked at U.S. ports. Therefore, the United States has jurisdiction to prosecute surveyors of foreign-flagged ships for knowing violations of MARPOL committed on foreign-flagged ships docked in U.S. ports.

### Implications for the Port State Control Program

Port State Control inspection statistics indicate that most vessels entering U.S. ports are complying with their safety and environmental requirements. Additionally, the United States has gained a reputation for being “aggressive” in administering its inspection program, which could be driving non-compliant boats to other ports instead of increasing overall compliance.<sup>11</sup> The holding in *Pena* could result in increased MARPOL compliance in U.S. ports, but possibly drive a decrease in vessel traffic because of a fear of criminal prosecution for the improper certification of non-compliant vessels.✈

### Endnotes

1. J.D. Candidate, 2014, University of Maine School of Law.
2. *United States v. Pena*, 2012 WL 2327650, at \*1 (11th Cir. June 20, 2012).
3. Press Release, The United States Attorney's Office for the Southern District of Florida, Three Individuals and a Corporation Convicted in Oil Pollution Conspiracy (Sept. 27, 2010).
4. See Commander Andrew J. Norris, *The Other Law of the Sea*, 64 NAVAL WAR COLL. REV. 78, 94 (2011).
5. INTERNATIONAL MARITIME ORGANIZATION, Status of Conventions, <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx> (last visited July 9, 2012).
6. 1340 U.N.T.S. 62.
7. *Pena*, 2012 WL 2327650 at \*1.
8. *Id.* at n. 2.
9. *Pena*, 2012 WL 2327650 at \*3.
10. *Id.* at \*5.
11. Norris, *supra* note 4, at 92-93.



# Supreme Court to Decide If Temporary Flooding Is a Taking

Catherine Janasie<sup>1</sup>



PHOTOGRAPH OF A FLOODED FOREST COURTESY OF CHRIS VIOLETTE.

On April 2, 2012, the U.S. Supreme Court agreed to review the case of *Arkansas Game & Fish Commission v. United States*.<sup>2</sup> The Court will determine whether temporary deviations from a dam's operating plan that flooded and damaged downstream land is a taking. The case concerns the release of water from a dam operated by the U.S. Army Corps of Engineers (the Corps). The Corps decided to deviate from the usual release rates in the dam's operating plan at the request of farmers, who asked for a lower release rate that would flood their lands for a longer time period. However, the lower release rates also flooded trees in a management area owned by the Arkansas Game & Fish Commission (Commission), and the longer periods of flooding caused by the lower release rates damaged and destroyed many of the trees in the management area.

## Background

The case involves releases of water from the Clearwater Dam, which was completed in 1948 and is located in Missouri. Although the dam was constructed to reduce the adverse effects of the Black River flooding downstream lands, some water needed to be released from the dam. As with all of its dams, the Corps adopted a water control plan in 1953, which includes an operating plan that lays out the release rates for the dam.

At issue in this case were deviations from this operating plan that took place between 1993-2000. Under the plan, the Corps can adopt deviations to the release rates in certain situations, including for agricultural purposes. In 1993, the Corps approved deviations at the request of agricultural interests who wanted to reduce the rate at which water was released from the dam. The farmers preferred a lower release

rate because it reduces the height of water leaving the dam, but increases the period of time when water is released; it gives area farmers a larger time frame to harvest their crops.

During the same time, the Corps formed working groups that were charged with making permanent changes to operating plans for dams in the region, including the Clearwater Dam. Among the members of the working groups was the Arkansas Game & Fish Commission. The Commission owns the Dave Donaldson Black River Wildlife Management Area (Management Area), which is 115 miles south of Clearwater Dam on 23,000 acres on the banks of the Black River. The Commission objected to the deviations that would allow lower release rates from the Clearwater Dam because these rates would mean longer periods of flooding during the critical months of tree growing season, which could be damaging to the trees' root systems.

Unable to agree on permanent revisions to the operating plan, the working groups continued to adopt interim operating plans that allowed for temporary deviations from the 1953 water control plan. Overall, after the 1993 interim plan, the Corps approved three other interim plans from 1994-2000. All of these deviations were considered to be "temporary" in nature.

In 1999, the Corps once again set out to adopt permanent revisions to the release rates for the Clearwater Dam and prepared an Environmental Assessment (EA) under the National Environmental Policy Act (NEPA). Again, the Commission objected to the revisions to the release rates. In 2000 and 2001, the Corps and Commission conducted tests to determine the environmental impact of the revised release rates, and the tests confirmed that the proposed revisions would flood tree roots and cause potential damage or ultimately destroy the trees. Because of this, the Corps decided to abandon the changes to the plan and reverted back to the release rates in the 1953 water control plan.

After trying to resolve its property damage claims outside of court, the Commission sued the Corps in 2005 claiming the release rate deviations from 1993-2000 were a taking of the Management Area's timber. The United States denied that its actions resulted in a taking, claiming that temporary flooding is a tort and not a taking. While the trial court held that a taking had occurred and awarded over \$5 million in damages to the Commission, the appellate court reversed the decision, holding that the flooding was not a taking because the deviations from the operating plan were only "temporary" and not "inevitably recurring."<sup>3</sup>

### Taking?

The main question in this case is whether the flooding caused by the deviations in the release rates of the dam were a taking of property. A takings claim is a constitutional claim under the Fifth Amendment of the United States Constitution, which allows the government to "take" private property for a public purpose if the government pays the property owner just compensation for the property. In order for a government action to be a taking, the government has to permanently invade the person's property or interfere with the property owner's enjoyment of the property for an extended time period. If the government's actions are a taking, the government must give the property owner just compensation for the property. However, if the government's actions only injure the property, the property owner would have a tort claim and not a takings claim. A tort is a civil wrong that a party may be able to obtain a remedy, usually in the form of damages, for the harm done to the property. Therefore, under a takings claim, the party suing is entitled to just compensation if the government has taken the property, while in a tort claims, a party may or may not be able to collect damages for the harm done to the property.

**In order for a government action to be a taking, the government has to permanently invade the person's property or interfere with the property owner's enjoyment of the property for an extended time period.**

### Trial Court

At the trial court level, the court stated that temporary activity can support a takings claim and examined whether a taking occurred in this case. The court applied the *Ridge Line* test, which looks at whether the flooding is a taking or merely a tort by considering (1) whether the flooding was substantial enough to be a taking, and (2) whether the government could have predicted the alleged damage.<sup>4</sup> The court found that the flooding was substantial and predictable and awarded damages in the amount of \$5.5 million for the

dead or damaged timber and \$176,428.34 for regeneration costs. The United States appealed this decision, claiming that no taking occurred, and if one did, the damages awarded were too high. The Commission cross-appealed, claiming that the court should have awarded more for regeneration costs.

### Appeals Court

The appeals court reversed the trial court decision. Although the court stated that temporary actions could constitute a taking, the court noted that precedent has treated takings claims for the flooding of property differently than other takings claims, as the court must determine if the flooding was a tort or a taking. For there to be a taking, the flooding must be a permanent invasion of the land, meaning that there must be a continuing overflow on the property or the property must be subject to “a permanent liability to intermittent but inevitably recurring overflows.”<sup>5</sup> Otherwise, the court stated, the temporary flooding only injures the property and is merely a tort.

The court examined previous flooding cases and reaffirmed the *Ridge Line* test for examining whether the flooding is a taking or a tort, but determined that it did not need to engage in the *Ridge Line* analysis in this case because the deviations were temporary, and therefore, could not be a taking. In making this determination, the court stated that in deciding whether the flooding was temporary, courts should focus on the permanency of the flood control policy and not on the permanency of the structure causing the flooding. Here, the court held that because the deviations were temporary policies and not permanent revisions to the water control plan, the deviations were not “inevitably recurring” and could not be a taking.<sup>6</sup>

One justice issued a dissenting opinion. The dissent states that the majority misapplied the previous flooding cases, as the court should not only focus on whether the policies were temporary, but should also look at the significance and permanency of the harm caused by the flooding. Since there was permanent damage here, the dissent states that there was a taking.<sup>7</sup>

### Supreme Court Review

Unsatisfied with the appellate court’s decision, the Commission appealed the decision to the U.S. Supreme Court, who will hear the case during its upcoming fall term.<sup>8</sup> In its review, the Supreme Court will decide whether government actions creating flooding on one’s property must permanently continue to be a taking.<sup>9</sup> The Commission has asked the Supreme Court to clarify whether courts should consider all of the factors surrounding the flooding in

deciding whether a taking has occurred, or should use the appeals court’s approach, which states that if flooding is temporary, it cannot be a taking.

In its brief, the Commission argues that previous cases have established that temporary actions can be takings; therefore, the Court should treat flooding like all other physical invasions of property and reverse the appeals court decision that treats temporary flooding differently. The Commission argues that the appeals court improperly relied on early flooding cases and that courts should consider all factors in deciding whether flooding is a taking, including looking at how the flooding harmed and interfered with the property owner’s enjoyment of the property. At the time of publication, the United States had not yet submitted its brief for the Supreme Court case.

### Conclusion

By granting certiorari, the Supreme Court can shed light on how courts should review temporary flooding cases and decide whether these cases are takings. In doing so, the Court will determine whether the appeals court’s decision created a bright-line rule that bars all takings claims for temporary flooding caused by the government, and if so, whether it agrees with this rule. Moreover, this decision could have huge implications both for how the Corps manages its dams and for property owners whose property is damaged by temporary flooding by the government. If these temporary policies are not takings, the Supreme Court’s decision may affect how often the Corps adopts temporary versus permanent policies going forward. Further, as stated above, in deciding whether these cases are takings, the Supreme Court will be determining the type of compensation that property owners can seek from the government for damage done to their property by temporary flooding. If this flooding can be seen as a taking, then property owners can bring takings claims seeking just compensation from the government. 🐦

### Endnotes

1. Ocean & Coastal Law Fellow, Mississippi-Alabama Sea Grant Legal Program.
2. *Arkansas Game & Fish Comm’n v. U.S.*, 132 S.Ct. 1856 (2012).
3. *Arkansas Game & Fish Comm’n v. U.S.*, 637 F.3d 1366 (Fed. Cir. 2011).
4. *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003).
5. *Arkansas Game & Fish Comm’n*, 637 F.3d at 1374-75 (quoting *U.S. v. Cress*, 243 U.S. 316, 328 (1917)).
6. *Id.* at 1379.
7. *Id.* at 1382-83.
8. Petition for a Writ of Certiorari, *Arkansas Game & Fish Comm’n*, 2011 WL 5593237 (U.S.) (No. 11-597).
9. *Id.*

# Gulf Dead Zone Prompts Call for Stricter CWA Regulations

Josh Loring<sup>1</sup>



PHOTOGRAPH OF MISSISSIPPI RIVER HEADWATERS IN MINNESOTA COURTESY OF STEVE KOCINO.

Each year, pollution from the Mississippi River creates a large dead zone in the northern Gulf of Mexico. The dead zone is largely caused by agricultural runoff containing high concentrations of phosphorus and nitrogen from farming operations throughout the Mississippi River Basin. Both pollutants are subject to regulation by the EPA under the federal Clean Water Act. In March, several environmental groups filed suit against the EPA, arguing that the agency is required to regulate these pollutants more stringently so as to minimize the Gulf dead zone.

## Background

The Mississippi River headwaters begin in northern Minnesota, traveling south through the Midwest, finally reaching southern Louisiana and the Gulf of Mexico. The Mississippi River Basin covers over 40% of the continental U.S., and is composed of tributaries and watersheds that span as far east as New York and as far west as Montana. The river basin is one of the largest in the world, and acts as a funnel, draining all of the water from its reaches into the Mississippi

River and eventually the Gulf of Mexico. Along its way, the river picks up pollution from a variety of upstream sources that also finds its way to the Gulf.

Best evidence of that pollution can be seen in the Gulf of Mexico dead zone, which appears in late spring and continues through the summer. The excessive nutrient pollution from agricultural runoff contains high concentrations of phosphorus and nitrogen. The influx of nitrogen and phosphorus into the Gulf causes a large algae bloom that leads to depleted oxygen levels, resulting in a hypoxic zone where it is difficult for sea life to survive.

When confronted with the dead zone, fish and shellfish are left with two alternatives: suffocate from the lack of oxygen or escape to deeper depths outside the dead zone (which in some years can exceed 8,000 square miles). In addition to the disastrous effect the Gulf dead zone has on the environment and wildlife, the billion dollar commercial fishing industry has also felt the strain. The bigger the dead zone, the further fishermen must travel to land their catch, which means additional time and higher costs for the fishermen.

## Water Quality Regulations

To protect against harms like the dead zone, Congress passed the Clean Water Act (CWA) in the 1970s. The Act's main objective is to restore and maintain the integrity of the Nation's waters.<sup>2</sup> The Act calls for the protection of fish, shellfish, and wildlife, as well as recreational uses of the water.<sup>3</sup> The EPA is the federal agency charged with implementing the CWA, though in many instances this responsibility is undertaken by approved state agencies. The EPA achieves these goals by regulating the discharge of various pollutants into water bodies through a permitting system. The EPA also uses water quality standards where needed.

Water quality standards are based on the designated uses for specific bodies of water. States determine the designated use for each water body within their boundaries. When establishing the designated use, the state considers how a water body will be used by the public, taking into consideration recreation, drinking water supply, and commerce, among other things. Once identified, designated uses are protected by implementing water quality criteria, which can either be in the form of numeric nutrient criteria or narrative criteria. Numeric nutrient criteria establish specific numeric limits on how much of a pollutant can be present in a water body. Narrative water quality standards, on the other hand, are typically general, non-numeric nutrient criteria that simply call for water bodies to be free from harmful amounts of pollutants.

If the current technology based limitations under the CWA's permitting process are not stringent enough for the water body to meet the established water quality standards, the state is required to place the water body on its impaired waters list and rank it based on the severity of its impairment as compared to other impaired waterways in the state. The state then must go down the list of impaired water bodies, establishing for each a total maximum daily load (TMDL), which identifies the maximum amount of a pollutant that a discharger can add to a water body each day without violating water quality standards. The CWA requires states to submit both their impaired waters list and TMDLs to the EPA for approval.<sup>4</sup>

## Petition For Numeric Standards

On July 30, 2008, following years of scientific studies, several environmental groups (collectively Gulf Restoration Network) petitioned the EPA to establish numeric nutrient criteria and TMDLs for nitrogen and phosphorous pollution in the Gulf of Mexico and all of the waterbodies in the Mississippi River watershed. The petition identified how excessive levels of nitrogen and phosphorus lead to significant adverse impacts to the ecology of the Mississippi River and the Gulf, conflicting with the goals set forth by the CWA. Additionally, the petition pointed out that the states' existing narrative water


quality standards have not been effective in reducing pollution or protecting designated water uses.

The EPA denied the petition in 2011, stating that while it was in agreement with many of the environmental concerns regarding nitrogen and phosphorus pollution, it did not believe that its federal rulemaking authority was the best way to address the issue.<sup>5</sup> Instead, the EPA felt that building on existing efforts and working cooperatively with the states would be a more effective resolution.<sup>6</sup> Following the denial, Gulf Restoration Network filed suit against the EPA arguing that the EPA is required to issue new water quality standards under § 303 of the CWA.<sup>7</sup> This section obligates the EPA to issue new or revised standards when necessary to meet the requirements of the Act.<sup>8</sup>

## Farming Community Opposition

In early May, the American Farm Bureau Federation and more than a dozen state Farm Bureaus including Mississippi (collectively Farm Bureau) asked to join the lawsuit. For years, members of the farming community have strongly opposed efforts to require states to adopt more stringent numeric nutrient standards and TMDLs, citing excessive costs to farmers and an inability to accurately establish limits.<sup>9</sup> By joining the lawsuit, the Farm Bureau hopes to protect the interest of its members by supporting the EPA's stance that the issue should be left in the hands of the states and that a one size fits all approach is not the answer.

## Conclusion

Despite contentions that partnering with states is the most effective way to fight nitrogen and phosphorus pollution, the complaint points out that the EPA conceded recently to use its authority to develop federal numeric nutrient criteria for the pollutants in Florida.<sup>10</sup> The action was part of a consent decree with the Florida Wildlife Federation in response to a similar lawsuit. While the pollutants in both cases would be the same, the task of developing criteria for dozens of jurisdictions in an area the size of the Mississippi River Basin would surely be much different. 

## Endnotes

1. J.D. Candidate, 2013, Pace University School of Law.
2. 33 U.S.C. § 1251(a).
3. *Id.* § 1251(a)(2).
4. *Id.* § 1313(d)(2).
5. Complaint at 14, Gulf Restoration Network v. Jackson, No. 12-00677 (E.D.La. March 13, 2012), 2012 WL 950694.
6. *Id.*
7. 33 U.S.C. § 1313(c)(4)(B).
8. Complaint, *supra* note 5, at 3.
9. Motion to Intervene at 10, Gulf Restoration Network v. Jackson, No. 12-677 (E.D.La. May 10, 2012).
10. Complaint, *supra* note 5, at 15.

# Offshore Drilling Moves Forward Despite Litigation

Niki L. Pace and Benjamin Sloan<sup>1</sup>

Since the Deepwater Horizon oil spill in 2010, efforts to continue and expand offshore drilling in the Gulf of Mexico have faced numerous legal challenges. These lawsuits generally allege that the federal government has not adequately considered environmental concerns in the wake of the BP oil spill. At the time of the spill, the U.S. Department of Interior (DOI) was in the process of leasing areas of the Gulf of Mexico for mineral exploration and extraction. Following the spill, the agency continued with the leasing process, which included approving exploration plans on existing leases. A collection of environmental organizations filed lawsuits asserting that the approvals were not in compliance with federal law. This article discusses the outcome of two of those cases.

## Offshore Oil & Gas Exploration

Federal offshore oil and gas leasing on the outer continental shelf is regulated through the Outer Continental Shelf Lands Act (OCSLA). DOI oversees implementation of OCSLA and has delegated much of these responsibilities to the Bureau of Ocean Energy Management (BOEM, previously the Minerals Management Service). Under OCSLA, anyone wishing to lease submerged land for offshore mineral development must participate in a four stage process: (1) preparation for the lease, (2) the lease sale, (3) exploration, and (4) development and drilling. During each stage of the process, BOEM reviews the applicant's compliance with OCSLA and other applicable laws.

The cases here focus on the exploration and development aspects of offshore drilling. Before exploratory drilling may begin, leaseholders must submit an exploration plan to BOEM for approval. BOEM then reviews the exploration plan to assure that the plan “will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses in the area, or disturb any site, structure, or object of historical or archeological significance” as required by OCSLA.<sup>2</sup> The exploration plan must also certify compliance with applicable state coastal programs under the Coastal Zone Management Act.<sup>3</sup> The final stage – development and production – also requires agency approval of the

development plan, which has similar requirements as an exploration plan. Further, if the development plan is not consistent with an applicable state coastal program, that state's governor may veto the development plan.

In addition, exploration plans and development plans must both comply with the National Environmental Policy Act (NEPA). NEPA requires all federal agencies to consider the environmental impacts of proposed projects by preparing an environmental assessment (EA) or a more rigorous environmental impact statement (EIS).<sup>4</sup> The agency must prepare an EIS if the activity is a major federal action likely to have a significant impact on the environment. In certain circumstances, the activity may fall within a categorical exclusion which are categories of activities that the federal agency determines do not have significant effects on the environment. In those instances, the agency usually does not need to prepare either an EA or EIS.



PHOTOGRAPH OF THE BP OIL SPILL COURTESY OF KRIS KRÜG.

## Spring 2010 EPs

In *Gulf Restoration Network v. Salazar*, the Sierra Club, the Gulf Restoration Network, and the Center for Biological Diversity (collectively Gulf Restoration Network) challenged DOI's approval of 16 oil and gas exploration plans for drilling in the Gulf of Mexico off the coast of Louisiana.<sup>5</sup>

The approvals were issued between March 29 and May 20, 2010 (before and immediately after the oil spill). Gulf Restoration Network argued that DOI's approval of the plans violated OCSLA and NEPA because (1) DOI did not fully consider the impact of the BP oil spill, and (2) DOI improperly applied a categorical exclusion when conducting its NEPA analysis.

Here, DOI excluded the exploration plan from the environmental assessment requirement on the basis that the activity fell within a categorical exclusion. The CE at issue applies to offshore drilling in water depths less than 400 meters in the central or western Gulf of Mexico. According to Gulf Restoration Network, the CE should not have been used in this instance because these activities would take place in relatively untested deep water.

In reviewing the claims, the court first determined that DOI's approval of exploratory and development plans under OCSLA were reviewable by a court. However, the court went on to find that, as a procedural matter, Gulf Restoration Network should have availed itself of the administrative proceedings related to the approval of exploration plans. Therefore, the court did not decide whether DOI properly used the CE here, since the court concluded that Gulf Restoration Network's failure to participate in the administrative process barred the organization from bringing these arguments now.

#### Shell Exploration Plan S-7444

In *Defenders of Wildlife v. Bureau of Ocean Energy Management*, several parties (collectively Defenders of Wildlife) brought challenges to BOEM's approval of Shell Exploration Plan S-7444 (Shell EP).<sup>7</sup> The Shell EP includes ten exploratory wells on leases off the Alabama coast with depths ranging from 7,100 to 7,300 feet deep. As required by OCSLA, Shell submitted its exploration plan to BOEM for approval, and BOEM approved the Shell EP on May 10, 2011. On June 9, 2011, Defenders of Wildlife brought suit, arguing that the Shell EP violated NEPA and the Endangered Species Act (ESA).

In its NEPA claim, Defenders of Wildlife argued that BOEM's failure to prepare an EIS violated NEPA. In reviewing the Shell EP, BOEM prepared a less intensive EA and found that an EIS was unnecessary. Defenders of Wildlife maintained that the EA contained insufficient site-specific information to support BOEM's conclusion that an EIS was not needed. The court, however, found that the EA contained "a plethora of site-specific information on the potential impacts from Shell's proposed exploratory drilling."<sup>8</sup> Furthermore, the court stressed the deference owed to the agency's decision, ultimately upholding BOEM's NEPA determination that an EIS was not required.

In its ESA claim, Defenders of Wildlife contended that BOEM failed to comply with the ESA's consultation requirement. Under the ESA, BOEM cannot take actions that are likely to jeopardize threatened or endangered species or their habitat. BOEM consults with National Marine Fisheries Service (NMFS) and Fish and Wildlife Service (FWS) to insure adequate protections are taken. Here, BOEM reinitiated consultation with both NMFS and FWS following the oil spill; those consultations are ongoing. However, Defenders of Wildlife argued that BOEM could not approve the Shell EP until these consultations were concluded. The court disagreed, noting that BOEM can suspend activities under OCSLA if the reinitiated consultation leads to the discovery that threatened or endangered species may be jeopardized.

**Defenders of Wildlife maintained that the EA contained insufficient site-specific information to support BOEM's conclusion that an EIS was not needed.**

#### Conclusion

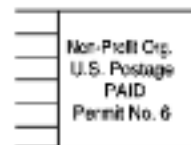
Though these lawsuits were unsuccessful, several environmental organizations continue to bring additional challenges to ongoing offshore leasing in the Gulf of Mexico. Most recently, Oceana, Defenders of Wildlife, Center for Biological Diversity, and Natural Resources Defense Council filed a lawsuit challenging BOEM's approval of an oil and gas lease sale in the Central Gulf of Mexico (Lease Sale 216/222), arguing that BOEM did not consider new information gathered after the spill.<sup>9</sup> A similar suit was filed in December 2011 challenging Lease Sale 218.<sup>10</sup>

#### Endnotes

1. J.D. Candidate, 2014, University of Mississippi School of Law.
2. 43 U.S.C. § 1340(g)(3).
3. *Id.* § 1340(c)(2).
4. 42 U.S.C. § 4332.
5. *Gulf Restoration Network v. Salazar*, 683 F.3d 158 (5th Cir. 2012).
6. Brief for Petitioner at \*2, *Gulf Restoration Network v. Salazar*, 683 F.3d 158 (5th Cir. 2012), 2011 WL 379853.
7. *Defenders of Wildlife v. BOEM*, No. 11-12598, 2012 WL 2362240 (11th Cir. June 22, 2012).
8. *Id.* at \*4.
9. *Oceana v. BOEM*, No. 1:12CV00981, 2012 WL 2263371 (D.D.C. June 18, 2012).
10. *Oceana v. BOEM*, No. 1:11CV02208, 2011 WL 6157491 (D.D.C. Dec. 13, 2011).



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