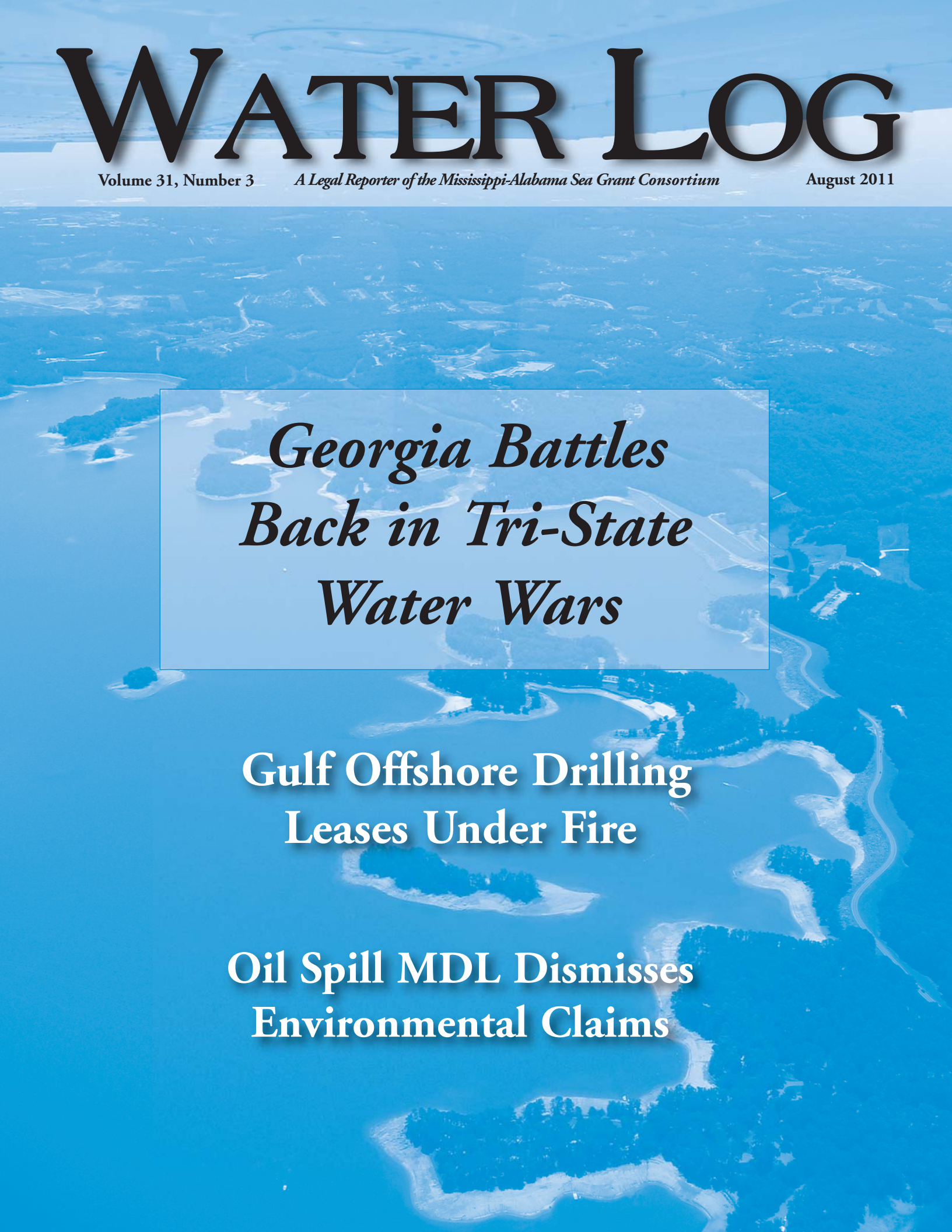


WATER LOG

Volume 31, Number 3

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

August 2011



*Georgia Battles
Back in Tri-State
Water Wars*

**Gulf Offshore Drilling
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Environmental Claims**

WATER LOG

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Cover photograph of Lake Lanier showing exposed shoreline courtesy of Ted Wada.

• UPCOMING EVENTS •

2011 Water and Health Conference

Where Science Meets Policy

October 3-7, 2011

Chapel Hill NC

<http://whconference.unc.edu/>

American Shore & Beach Preservation Association Conference

October 19-21, 2011

New Orleans

<http://www.asbpa.org>

APIEL 2011

*Appalachian Public Interest
Environmental Law Conference*

October 20-23, 2011

Knoxville, TN

<https://sites.google.com/site/apielconference/>

CERF 2011

*Societies, Estuaries and Coasts:
Adapting to Change*

November 6-10, 2011

Daytona Beach, FL

<http://www.sgmeet.com/cerf2011/>

GEORGIA BATTLES BACK IN TRI-STATE WATER WARS

Nicholas Lund¹

Fighting with its back against the wall, Georgia has scored an important victory in an ongoing struggle for the right to withdraw water from the Apalachicola-Chattahoochee-Flint (ACF) River Basin. On June 28, 2011, the U.S. Court of Appeals for the 11th Circuit released a decision throwing out a lower court's 2009 ruling which had required the states of Florida, Georgia and Alabama to enter into a water sharing agreement by July 2012.² The 11th Circuit ruling gives Georgia hope – at least until the next battle in this decades-long fight – that it will be able to continue to supply metropolitan Atlanta with high volumes of water from the ACF River Basin.

Background

In the 1950s, the U.S. Army Corps of Engineers constructed the Buford Dam across the Chattahoochee River north of Atlanta, forming a large reservoir named Lake Lanier. The dam and reservoir served several important roles for drought-plagued north Georgia, including water storage, flood control, hydropower production, recreation and, though considered the least-important at the time of construction, municipal water supply. At the time the dam was completed in 1957, it caused little disruption to the flow of the Chattahoochee as it worked its way south along the Georgia-Alabama border and into Florida, where it meets the Flint River and forms the Apalachicola River.

In the years following the dam's construction, Atlanta and most other north Georgia municipalities were withdrawing water downstream of the dam at relatively low levels.

However, the population of north Georgia, and Atlanta in particular, grew spectacularly in the 60s and 70s. Beginning in 1973, federal and state officials began planning for increased municipal withdrawals from Lake Lanier and the Chattahoochee River. A plan to construct a second dam to store outflows from the Buford Dam failed to receive support from Congress, and Georgia and the Corps were forced to continue to increase withdrawals from Lake Lanier. These withdrawals were permitted by a series of contracts between the Corps and north Georgia towns under the stated authority of the Water Supply Act (WSA), a 1958 law that authorized the Corps to allocate storage in federal



Aerial photograph of Buford Dam courtesy of the USACE.

reservoirs for local water supply, so long as the localities paid for the water. Though the majority of these contracts expired in 1990, the Corps continued to permit the localities to withdraw water from Lake Lanier.

Alabama filed suit against the Corps in 1990 to challenge the continued withdrawal of water from Lake Lanier, increases that were weakening the downstream levels of the ACF River Basin; Florida joined the suit against Georgia. In 1992 the three states entered into a Memorandum of Agreement (MOA) to study the water supply issue and, in the meantime, permit Georgia to continue withdrawing water at its present rate. The states briefly entered into a Compact governing water withdrawals, but the agreement was left to expire in 2003 when the states failed to agree on a water sharing formula. Lawsuits were filed on both sides, including several from Alabama and Florida challenging the increase in withdrawals from the ACF Basin, and one from Georgia seeking to compel the Corps to permit the state to increase withdrawal. Four of these lawsuits were consolidated into a multidistrict litigation and assigned to a Florida district court, which ruled on the case in 2009.

2009 Ruling

In July 2009, the U.S. District Court for the Middle District of Florida ruled against Georgia's attempt to increase its withdrawals.³ The district court held that the Corps exceeded its authority in considering a reallocation of 22% of Lake Lanier's conservation storage to municipal withdrawal, ruling that such a shift would constitute a "major operational change" under the WSA and thus require congressional approval. Further, the court held that the current levels of withdrawal exceeded the WSA in that they seriously affected hydropower generation, considered by the court to be the primary authorized purpose of the Buford Dam.

The ruling was a major blow to Georgia. The district court gave the states three years – until July 2012 – to work out an agreeable solution to the water withdrawal issues. If an agreement could not be made, the court would limit Atlanta's withdrawals to mid-1970s levels: a potentially catastrophic scenario for north Georgia residents. Both the Corps and Georgia appealed this decision to the 11th Circuit.

11th Circuit Appeal

The 11th Circuit reversed the lower court, giving Georgians hope for an increase in withdrawals.⁴ First, the 11th Circuit held that the Corps had not taken

"final agency action" in three of the four consolidated cases, and thus the claims alleged in those cases are premature.⁵ These claims were brought under the Administrative Procedure Act (APA), which seeks to avoid agency delays and premature litigation by requiring that suits may only be brought against those agency actions that are "final."⁶ Those three cases made claims against the Corps' allocation of water from Lake Lanier under the MOA, the ACF Compact, and in Corps' water control plans and manuals for the ACF Basin. But the Corps never finished those three plans for allocation, and therefore, there was no final agency action for a court to review, making the district court ruling inappropriate.

Next the 11th Circuit considered claims related to the Corps' rejection of Georgia's 2000 request for increased water withdrawals. In the 2009 ruling, the district court held that the RHA did not authorize water supply storage in Lake Lanier; therefore, any attempts to allocate water under the authority of the Water Storage Act would be impermissible due to a provision in the WSA prohibiting reservoir projects that would significantly affect the lake's authorized purposes. The RHA gave the Corps the authority to construct a number of dams across the country, each in accordance with conditions and recommendations made by the Chief of Engineers. Namely, the RHA authorized construction of the Buford Dam and established the Corps' operational authority over the project. This authority was further defined through incorporation of the engineer's report for the project – the Newman Report.

Upon review, the 11th Circuit found several instances of support for municipal water withdrawal in the engineering report and other supporting documents used to develop the ACF River Basin, as well as support for an increase in such to serve a growing population.⁷ Citing the Newman Report, the court noted "the dam was designed with water supply specifically in mind."⁸ The 11th Circuit disagreed with the lower court's determination that municipal water withdrawal was not an authorized purpose of the dam under the RHA. Consequently, the Corps had improperly denied Georgia's previous request for increased water allocation based on the agency's mistaken belief that it lacked authority under the RHA to allocate water from Lake Lanier.

To that end, the court remanded Georgia's 2000 request to the Corps for reconsideration in light of its newly illuminated responsibilities.⁹ The Corps had

denied Georgia's request because the Corps interpreted the RHA to provide that municipal water supplies were not an authorized purpose of the Buford Dam and Lake Lanier, and thus the WSA was inapplicable. However, since finding that the RHA authorized water storage, the Corps' failure to consider the effects of the WSA – a statute that supplements RHA water allocation authority – was an error of law. In reassessing Georgia's request, the Corps must determine its balance of responsibility between water storage and hydropower generation in the reservoir. This will require the Corps to define its authority to provide Atlanta's water supply needs under the RHA and the WSA.

The Battle Continues

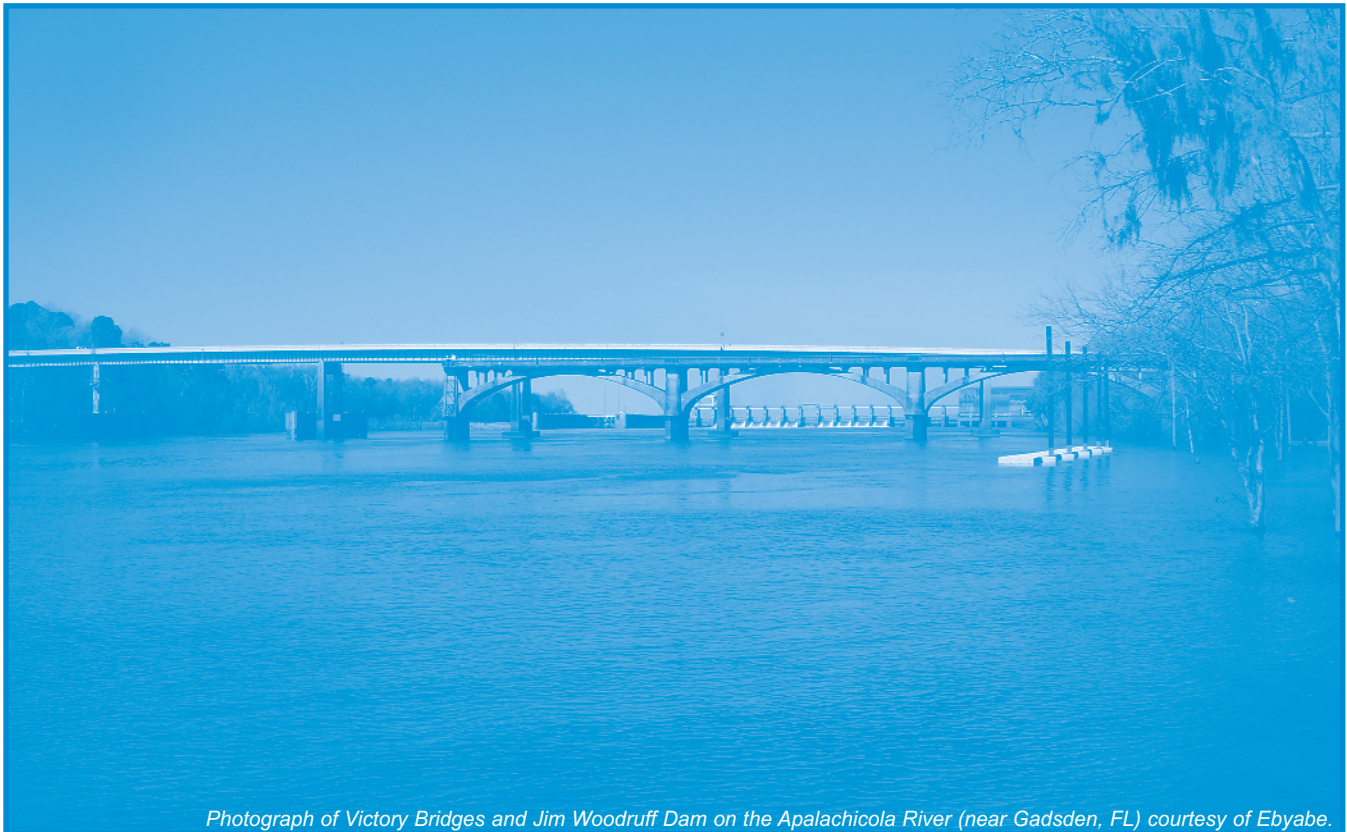
The 11th Circuit opinion places a considerable and immediate burden on the Corps. The agency must reconsider Georgia's request for increased allocation and reinterpret its own authority with respect to water supply in the ACF River Basin. Finally, and perhaps most importantly, the Corps must finalize allocation plans for the ACF River Basin. The court gave the Corps just one year to come to a "well-reasoned, definitive, and final judgment as to its authority under the RHA and the WSA."¹⁰ The court's exasperated tone and creation of deadlines reflects its weariness with the

decades-long struggle to resolve the water-allocation question, a sentiment likely echoed by residents of the Southeast.

While all parties hope for a quick resolution, the stakes and the scale of the debate suggest the Tri-State Water Wars will continue to rage on. Alabama has already announced plans to appeal this decision and have the full 11th Circuit consider the decision. However, at least for the next year, it appears that the three states battling over water from the ACF River Basin will wait on the Corps before planning their next moves.

Endnotes

1. National Sea Grant Law Center 2010-2011 Ocean and Coastal Law Fellow.
2. See Jonathan Proctor, *Court Rules in Tri-State Water Dispute*, 29:3 WATER LOG 6 (Nov. 2009).
3. *In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d 1308 (M.D. Fla. 2009).
4. *In re MDL-1824 Tri-State Water Rights Litig.*, 2011 WL 2536507 (11th Cir. June 28, 2011) (per curiam).
5. *Id.* at *20.
6. 5 U.S.C. § 704.
7. *Tri-State Water Rights Litig.*, 2011 WL 2536507 at *22-25.
8. *Id.* at *16.
9. *Id.* at *26.
10. *Id.* at *34.



Photograph of Victory Bridges and Jim Woodruff Dam on the Apalachicola River (near Gadsden, FL) courtesy of Ebyabe.

Oil Spill MDL Dismisses Environmental Claims

April Killcreas¹

On June 16th, a federal court dismissed certain environmental claims against BP and other companies arising from the Deepwater Horizon oil spill. The cases were part of the multi-district litigation consolidating oil spill lawsuits in New Orleans, Louisiana. These claims were brought by environmental groups seeking an injunction to prevent BP and others from operating offshore facilities in a manner likely to result in further violations of the Clean Water Act (CWA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Endangered Species Act (ESA), and the Emergency Planning and Community Right-to-Know Act (EPCRA). The court found that, because the well is no longer leaking oil into the Gulf of Mexico, the claimants lacked standing to bring the suit in federal court, and, moreover, that these claims were moot.²

Standing

Article III of the U.S. Constitution limits federal courts' judicial review to actual "cases and controversies," meaning that, in order for someone to bring a claim in federal court, the person must demonstrate that she has standing to sue. To establish standing, a claimant must show that she has suffered an injury-in-fact that is fairly traceable to the defendant's action and that a favorable decision by the court will redress her injury. If a person lacks standing, then the federal court cannot hear the case and must dismiss the claim.

Here, the environmental groups were seeking an injunction that would stop BP and other companies "from operating their offshore facility in such manner

as will result in further violation" of various laws.³ The difficulty faced by the environmental parties was that an order preventing the companies from engaging in such activities in the Gulf would not redress the environmental harm. To sufficiently redress the alleged injuries, the injunction would have to provide a benefit to the Gulf or reduce the amount of pollutants in the waters. Because the blown-out Macondo well is no longer leaking oil into the Gulf and there is no other similarly situated well that could suffer a similar fate as the *Deepwater Horizon*, the court determined that the injunction sought by the environmental groups would serve no purpose.

In addition, BP and the Unified Area Command have engaged in clean-up efforts throughout the Gulf in the year following the oil spill. Their actions eliminate the need for judicial intervention into the clean-up absent a claim of deficiency in state and federal remediation efforts, which the environmental groups have not alleged. And furthermore, the court noted that redressing these claims would require the involvement of parties not involved in this lawsuit, namely the various government agencies undertaking the oil spill clean-up. Because their injuries were

not redressable by the court, the environmental groups lacked standing.

Mootness

Along with standing, the environmental groups must also present an actual controversy. Even where a claim may be reviewable at the time the lawsuit is filed, later actions may eliminate the controversy at issue or the

The court found the claims moot because the environmental parties sought to stop discharges that have already ceased.

party's legal interest in the litigation. Where that happens, the claim becomes moot. In the current matter, the environmental parties must show that their claim for relief is based on persistent and ongoing violations of the federal environmental laws.⁴ The well at issue has not discharged oil since July 2010; as such, there are no ongoing environmental violations due to discharging oil. The court found the claims moot because the environmental parties sought to stop discharges that have already ceased.

Conclusion

The court also ruled that the environmental groups could no longer pursue citizen suit actions under the CWA, CERCLA, ESA, and EPCRA because no ongoing violations were occurring; the citizen suit provisions of those statutes do not allow federal courts to hear cases concerning violations that occurred entirely in the past. The court's dismissal of these environmental claims has no effect on the status of other claims for economic losses filed by businesses in the Gulf, commercial fishermen, and property owners. Nor does this ruling affect trespass and nuisance claims brought by the environmental groups under maritime and state law; the court will address these issues at a later date.

In a related matter, a federal magistrate judge ruled that the Sierra Club could not join a lawsuit brought by the U.S. Department of Justice against BP and eight other companies for violations of the Clean Water Act and the Oil Pollution Act. The lawsuit was filed in December 2010 in the same court as the Oil Spill MDL.⁵ The Sierra Club had requested to intervene; DOJ argued against the motion on the grounds that allowing other parties to participate would interfere with the United States' exclusive right to control the prosecution. Sierra Club will be allowed to file a brief with the court making its position known but will not be considered a party in the lawsuit.⁶

Endnotes

1. 2012 J.D. Candidate, Univ. of Mississippi School of Law.
2. In re: Oil Spill by the Oil Rig Deepwater Horizon, MDL No. 2179, 2011 WL 2448206 (E.D. La. June 16, 2011).
3. *Id.* at *2.
4. *Id.* at *10.
5. United States v. BP Exploration & Prod., Inc., No. 2:10-cv-04536-CJB-SS, 2010 WL 5094310 (E.D. La. filed Dec. 15, 2010).



Photograph of oil containment boom deployed in wake of Deepwater Horizon spill courtesy of U.S. Navy.



Gulf Offshore Drilling Leases Under Fire

Niki L. Pace¹

Immediately following last year's Deepwater Horizon oil spill, the federal government issued a short-term moratorium on deepwater oil drilling; that moratorium has now been lifted. Federal agencies have also instituted new policies and requirements for offshore deepwater drilling aimed at safeguarding against another Deepwater Horizon incident. But have they done enough? One organization does not think so and considers the overhaul of industry regulation merely ceremonial. Last year, the Defenders of Wildlife (Defenders) brought suit against the Bureau of Ocean Energy Management, Regulation, and Enforcement, challenging ongoing offshore leasing in the Gulf of Mexico. This May, an Alabama federal district court considered whether the lawsuit should proceed to trial or whether BOEMRE's motion to dismiss the lawsuit should be granted.²

Background

In the spring of 2010, BOEMRE finalized over 200 deepwater oil and gas lease purchases, collectively known as Lease Sale 213 with the sale being completed after the Deepwater Horizon spill. Lease Sale 213 included individual offshore leases in Gulf waters; lease purchasers receive authority to explore and drill during the duration

of the lease. Offshore oil and gas leasing is governed by the Outer Continental Shelf Lands Act which sets out a four-step process: (1) preparation of a leasing program by BOEMRE, (2) lease sales during which buyers bid at auctions for leases, (3) exploration, and (4) development and production. The present dispute concerns BOEMRE's actions under the lease sales phase.

In this case, Defenders sued alleging that BOEMRE violated the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) in completing Lease Sale 213. Defenders sought an injunction to stop current deepwater drilling lease sales approved under the present BOEMRE process. BOEMRE moved to dismiss the lawsuit, arguing both mootness and ripeness issues. Intervening parties, the American Petroleum Institute, the U.S. Oil & Gas Association, and the International Association of Drilling Contractors, also requested dismissal on the grounds that no violations of NEPA or the ESA had transpired.

BOEMRE's Motion to Dismiss

When considering a motion to dismiss, the court reviews the evidence in the light most favorable to the party that filed the lawsuit. To overcome a motion to dismiss, the person filing the lawsuit must supply sufficient facts to make a "plausible" claim to relief. In other words at this stage of the lawsuit, Defenders is not required to prove that it *will* win at trial. But Defenders does have an obligation to lay out enough information to show that Defenders *may* win at trial.

Before the court were allegations under two environmental laws – NEPA and ESA. Beginning with the NEPA claims, Defenders argued that BOEMRE relied on an outdated Multi-sale EIS in assessing the leases in Lease Sale 213. Under NEPA, federal agencies must take a hard look at the environmental impacts of their actions where those actions may have a significant environmental

impact. To do this, agencies prepare an environmental assessment (EA), or where appropriate, a more detailed environmental impact statement (EIS). Here, BOEMRE prepared a Multi-sale EIS that covered all deepwater drilling leases in the Gulf of Mexico from 2007-2012, eleven leases in total. BOEMRE conducted an EA for each lease that related back to the overall Multi-sale EIS. (This process of utilizing one overall EIS with individual EAs is referred to as a tiering system.)

According to Defenders, BOEMRE should have completed a new, supplemental EIS after the Deepwater Horizon spill and failure to do so was a violation of NEPA. BOEMRE pointed to evidence that a supplemental EIS was underway, thereby making Defenders' claim moot. A claim is moot when there is no longer any dispute between the parties. However, because Lease Sale 213 continued to rely on the existing Multi-sale EIS through the tiering process, the court found that the matter was not moot as to current and past lease sales.³ Likewise, challenges to past and current purchases under Lease Sale 213 were ripe for review. Under the ripeness doctrine, courts are prohibited from ruling on speculative claims. But, as the court clarified, Defenders claims were based on past and current leases under Lease Sale 213, not future activities; thus the claims were ripe for review.

Turning next to ESA claims, Defenders advocated that an incident such as the Deepwater Horizon showcases the explicit need to reinitiate consultation to assure species are being adequately protected after new dangers are discovered. The ESA provides strong protections for any species listed as endangered or threatened and extends those safeguards to a species' critical habitat as well. Section 7 of the ESA obligates BOEMRE to consult with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) to insure that BOEMRE's actions cause "no jeopardy" to listed species. And if new information reveals previously unconsidered effects on the species, the agency must reinitiate consultation with FWS and NMFS.

Defenders claimed that BOEMRE failed to reinitiate consultation with NMFS and FWS following the oil spill, and that BOEMRE neglected its individual obligation to cause no jeopardy to protected species. In deciding the matter, the court emphasized that consultation is not a one-time obligation, but rather a continual process. However, the court dismissed as moot Defenders' consultation claim in light of letters produced by BOEMRE proving ongoing consultation efforts. As to BOEMRE's "no jeopardy" responsibilities, the court denied the motion to dismiss because, again, Defenders were chal-

lenging BOEMRE's previous actions, not future speculative lease sales.⁴

Intervenors' Motion to Dismiss

The intervening parties argued that the case should be dismissed since (1) no supplemental EIS was required under NEPA because no major federal action occurred, (2) no ESA violation happened because Lease Sale 213 took place before the spill, and (3) no ESA violation occurred because carrying out a lease sale only involves preliminary activities which do not harm endangered species. Though details varied, the Intervenor's basic argument was that Lease Sale 213 occurred wholly prior to the Deepwater Horizon oil spill, and as such, BOEMRE incurred no new obligations under NEPA and the ESA as to the sale. The court, however, disagreed, pointing to certain lease sale actions undertaken by BOEMRE after the spill.

Conclusion


This ruling narrowed the issues between the parties, which will allow both sides to focus on settling the remaining disputes. At this early stage of the lawsuit, no trial date has been set and the parties have waived the right to a jury trial.⁵

Meanwhile, BOEMRE faces similar challenges to its approval of a Shell deepwater oil exploration plan in the Gulf.⁶ That project would take place off the Alabama coast and involves placing five wells at a depth greater than 7,000 feet (deeper than the Deepwater Horizon rig). BOEMRE relied on the same Gulf-wide environmental analysis that was used to permit the Deepwater Horizon and concluded that the plan was unlikely to have any significant impact on the environment. The lawsuit was filed in the U.S. Court of Appeals for the Eleventh Circuit (Atlanta) in June.⁷

Endnotes

1. Research Counsel, Mississippi-Alabama Sea Grant Legal Program. Research assistance provided by Ellen Burgin, 2013 J.D. Candidate, Univ. of Mississippi School of Law.
2. *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt., Regulation, & Enforcement*, No. 10-0254, 2011 WL 2013977 (S.D. Ala. May 23, 2011).
3. *Id.* at *4.
4. *Id.*
5. Report of Parties, *Defenders of Wildlife*, No. 10-0254 (S.D. Ala. May 31, 2011), 2011 WL 2198692.
6. Harry R. Weber, *Environmental groups challenge Shell drilling plan*, SUN HERALD (Biloxi), June 9, 2011, <http://www.sunherald.com/2011/06/09/3182256/environmental-groups-challenge.html>.

FIFTH CIRCUIT REJECTS NEW CAFO RULE



Stephanie Showalter Otts¹

The Fifth Circuit Court of Appeals recently rejected changes to the Environmental Protection Agency's management of concentrated animal feeding operations (CAFOs). The rule, issued in 2008, met with opposition from all sides, eventually leading to this litigation. Through the rule, EPA was exercising Clean Water Act (CWA) authority to regulate pollutants flowing into navigable waterways. However, after a careful review of the 2008 Rule, the court found that certain liability provisions exceeded EPA's authority.²

Background

Section 301(a) of the CWA (33 U.S.C. § 1342(a)(1)) prohibits the discharge of any pollutant by any person absent a permit from either the EPA or the Corps of Engineers, as appropriate. "Discharge of a pollutant" is "any addition of any pollutant to navigable waters from any point source." (33 U.S.C. § 1311(12)). EPA is responsible for implementing the National Pollutant Discharge Elimination System (NPDES) permit program pursuant to § 402 of the CWA.

In 1976, EPA began requiring CAFOs that discharge pollutants into navigable waters to obtain NPDES permits. CAFOs are industrial agricultural facilities that keep and feed hundreds, sometimes even thousands, of animals before slaughter; any such facility that confines and feeds animals for a total of 45 days a year is considered a CAFO. Not surprisingly, CAFOs can generate enormous amounts of waste. If that waste is not handled properly, significant water quality and other environmental problems can arise.

In 2003, the EPA significantly altered its long-standing CAFO rule, due in part to successful litigation by environmental groups challenging EPA's failure to update the rule despite significant changes in livestock production industries. Whereas the 1976 Rule required

only those CAFOs that discharged pollutants to apply for and obtain NPDES permits, the 2003 Rule required *all* CAFOs to apply for a NPDES permit based upon a presumption that every CAFO has the "potential to discharge." Only those CAFOs who could prove to the EPA's satisfaction that they did not have the potential to discharge were exempt from this duty to apply. In addition, CAFOs applying for permits were required to develop site-specific Nutrient Management Plans (NMP) based on best management practices for dealing with storage of waste, management of chemicals, and site-specific protocols for land application. In 2005, the Second Circuit Court of Appeals in *Waterkeeper Alliance v. EPA* determined that the 2003 Rule's "duty to apply" exceeded the EPA's authority under the CWA. According to the court, the plain language of the CWA requires NPDES permits only for actual "discharge of pollutants," not potential discharges.³ Therefore, EPA could not force CAFOs to apply for NPDES permits on the basis of a potential to discharge. Following the *Waterkeeper* decision, EPA began the process of revising its CAFO regulations. New regulations were issued in 2008 (the "2008 Rule").

Duty to Apply

Although the 2008 Rule retained the "duty to apply" struck down by the Second Circuit, EPA clarified that only those CAFOs that discharge or *propose to discharge* pollutants were required to apply for a NPDES permit. CAFOs that were "designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge" did not have to apply for a NPDES permit.⁴ If a CAFO did not apply for a permit and a discharge later occurred, however, the CAFO operator would face liability under the 2008 Rule on two separate counts: (1) discharging a pollutant without a permit,

and (2) failing to apply for the permit in the first place. The National Pork Producers Council and several other industry groups challenged the 2008 Rule, arguing that EPA exceeded its statutory authority by requiring CAFOs that propose to discharge to apply for a permit and by imposing liability for failure to apply for a permit.

The Fifth Circuit, relying heavily on the Second Circuit's reasoning in *Waterkeeper*, agreed. Like the Second Circuit, the Fifth Circuit determined that the language of the statute was clear: without an actual discharge of pollutants EPA has no authority. According to the Fifth Circuit, CAFOs that are not discharging pollutants or do not intend to discharge cannot be required to apply for a permit. CAFOs that "propose to discharge" fall outside the EPA's authority. For the court, the problem lay with how EPA defined "proposed discharge." Under the 2008 Rule, a CAFO that "proposes to discharge" is not a CAFO that plans on discharging pollutants; rather it is a CAFO that is designed or operated in such a way that creates a high probability that a discharge will occur. In the court's opinion, the risk of a discharge is not enough. EPA does not have authority to regulate a facility unless the operator actually intends to discharge pollutants or the facility actually discharges.

As for the 2008 Rule's imposition of liability for failure to apply for a permit, the Fifth Circuit determined that the CWA does not provide the EPA with the authority to create such liability. Although the EPA can assess criminal and civil penalties as appropriate for discharging pollutants without a permit or for violations of permit conditions, the EPA may not assess penalties for failing to apply for a NPDES permit.

Conclusion

Although the industry has once again successfully challenged the EPA's attempt to regulate CAFOs with the

high potential to discharge pollutants, CAFOs that discharge pollutants into navigable waters remain subject to EPA regulation. The court's ruling, however, may make the EPA's job much harder. Some CAFO operators who are risk adverse and unsure of the likelihood of a discharge may seek to obtain a permit "just in case" a discharge were to occur. In those situations, the NPDES permitting process will allow EPA to monitor the operation and ensure that the facility is adhering to best management practices. Other CAFO operators may decide to avoid the permitting process and "hope for the best." If they guess wrong and a discharge results, they would face significant fines for discharging without a permit. Unfortunately, those fines would come too late to prevent the contamination of the environment. ⚡

Endnotes

1. Director, Mississippi-Alabama Sea Grant Legal Program. Research assistance provided by Christopher Motta-Wurst, 2012 J.D. Candidate, Univ. of Mississippi School of Law.
2. *National Pork Producers Council v. EPA*, 635 F.3d 738, 750 (5th Cir. 2011).
3. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505 (2nd Cir. 2005).
4. *National Pork Producers*, 635 F.3d at 750.



Photograph of cattle feeding operation courtesy of the NRCS.

GULFPORT SUES SECRETARY OF STATE OVER HARBOR CONTROL

Travis M. Clements¹

Recently, the City of Gulfport filed a lawsuit against Mississippi Secretary of State Delbert Hosemann, alleging that the Secretary of State lacks authority to execute state tidelands leases and collect revenue on behalf of the city-owned Small Craft Harbor.² In its complaint, Gulfport alleges it owns and exclusively controls the harbor through a 1935 deed and authority granted under the Small Craft Harbors Act of 1935.

Background

In July 1935, Grace Jones Stewart, daughter of Gulfport co-founder Joseph T. Jones, executed a Deed of Conveyance to the City of Gulfport, conveying the property, lands, reclaimed lands, waters, and areas known as the Gulfport Small Craft Harbor (recently renamed the Bert Jones Yacht Basin). Located on the Mississippi Sound near the intersection of U.S. Highways 49 and 90, the grounds include the Small Craft Harbor and Jones Park, the largest public park on the Mississippi Gulf Coast. The Jones family imposed deed restrictions, requiring Gulfport to use the property for construction and maintenance of playgrounds, modern amusement purposes and recreational parks, and to construct and maintain a harbor for yachts, sail boats, and other watercraft. In the event Gulfport ceases these uses, the property reverts to the Jones family. When Grace Jones Stewart executed the July 1935 deed to Gulfport, it was not recorded until six months later. Gulfport explains the primary reason for this delay is that on December 7, 1935, the Mississippi Legislature enacted the Small Craft Harbors Act, an act for which Ms. Stewart lobbied extensively.

The Small Craft Harbor and Jones Park experienced total destruction during Hurricane Katrina, and

in the ensuing years, Gulfport spent \$42 million renovating the facilities for public re-opening. In early 2011, the Secretary of State declared its intent to sign a harbor lease with Gulfport, claiming the water bottoms are state-owned tidelands. Gulfport refused to sign the lease, citing its authority to own and operate its own harbor under the Small Craft Harbors Act. The Secretary of State claims the Tidelands Act supersedes the Small Craft Harbors Act authority.

Tensions Between Two Laws

The central dispute in this lawsuit revolves around two Mississippi laws – the Small Craft Harbors Act and the Public Trust Tidelands Act. The Small Craft Harbors Act gives coastal cities along the Mississippi Sound or Gulf of Mexico the authority to own property “for the purpose of establishing, developing, promoting, maintaining, and operating harbors for small water crafts and recreational parks connected therewith within its territorial limits.”³ The act further requires that any improvements or new construction be maintained and operated under the city’s control.

On the other hand Mississippi’s Public Trust Tidelands Act gives the Secretary of State control of all state-owned water bottoms and adjacent property subject to the tide’s ebb and flow (tidelands).⁴ The Tidelands Act grants authority to the Secretary of State to delineate the state’s tideland boundaries and enter into leases for use of public tidelands. Tidelands leases provide revenue to municipalities through boat-slip fees and commercial rent payments, and any lease funds collected from casino development go to the state’s Tidelands Fund for Coast Projects. The Tidelands Act requires all public projects of any governmental entity



that serve a *higher public purpose* to be exempt from any tidelands use or rental fees. Higher public purposes include promoting conservation, reclamation, preservation of the tidelands and submerged lands, public use for fishing, recreation or navigation, or the enhancement of public access to such lands.

The Lawsuit

Gulfport alleges it has the exclusive right to operate and control its harbor by way of the Grace Jones Stewart Deed of Conveyance and under authority granted by the Small Craft Harbor Act and other laws.⁵ Gulfport built, later rebuilt, and has continuously maintained, owned, and operated a harbor and provided harbor access and recreational activities on the property for the past 75 years. In addition, Gulfport has made numerous improvements to the property over the years, including the addition of docks, slips, wharves, boat launches, piers, parking areas, pavilions, picnic and playground areas, and breakwaters.

Although the Secretary of State claims the Tidelands Act controls, Gulfport explains that its use of the tidelands serves a “higher public purpose.” Citing recent Mississippi Supreme Court opinions, Gulfport asserts that tidelands follow the doctrine of public trust, and “the only way public trust lands can be disposed of is if it is done pursuant to a ‘higher public purpose,’ while at the same time not being detrimental to the general public.”⁶ Mississippi recognizes public trust purposes as including navigation, transportation, bathing, swimming, and other recreational activities.

Legislative Solution?

During the 2011 Legislative Session, the Mississippi House of Representatives passed a resolution that would have clarified discrepancies between the Small Craft Harbors Act and the Tidelands Act.⁷ Under the House Resolution, the Small Craft Harbors Act would continue to grant ownership and control of municipal harbors, adjoining parks, structures, and areas to certain cities; the properties would not be under control or regulation of the Secretary of State.

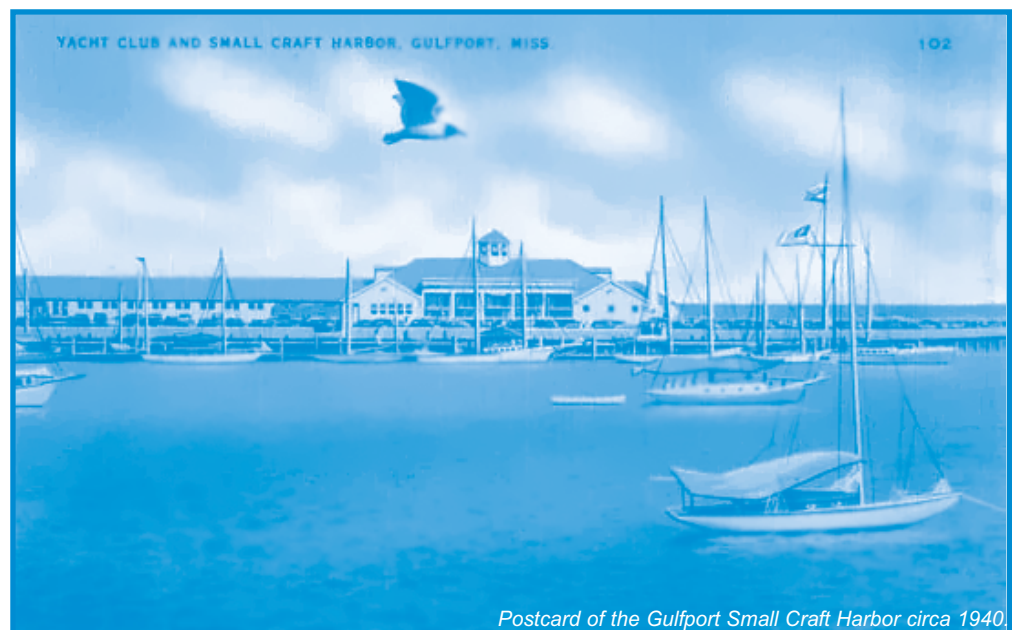
Furthermore, the resolution specified that the operation and maintenance of these facilities would be consistent with the “higher public purposes” intended by the Public Trust Tidelands Act. However, this resolution failed to pass the Mississippi Senate by a narrow margin, leaving these issues unresolved.

Conclusion

Gulfport is asking the court to declare that it owns and controls the Small Craft Harbor and that the Public Trust Tidelands Act does not supersede the Small Craft Harbors Act. Gulfport further asks that the Secretary of State be prohibited from asserting ownership or authority over the harbor, including the authority to enter into harbor leases on its behalf. However, the dispute with Gulfport has not stopped the Secretary of State from pursuing similar leases with other coastal communities. Using Tidelands Act authority, the Secretary of State recently signed harbor leases with the cities of Pass Christian, Bay St. Louis, and Long Beach, and Jackson County, Mississippi.⁸

Endnotes

1. 2012 J.D. Candidate, Mississippi College School of Law.
2. Complaint, City of Gulfport v. Sec’y of State of Miss., No. 11-01388(2) (Ch. Ct. Harrison Cnty. June 6, 2011).
3. MISS. CODE ANN. §§ 59-15-1 to -19.
4. MISS. CODE ANN. §§ 29-15-1 to -23.
5. Complaint, *supra* note 1, at *4.
6. *Id.* at *5.
7. H.R. Con. Res. 133, 126th Leg., Reg. Sess. (Miss. 2011).



Comer is Back: Mississippi Residents Re-file Climate Change Lawsuit


Niki L. Pace¹

In late May, Mississippi residents re-filed *Comer v. Murphy Oil USA, Inc.*, a class action lawsuit premised on climate change liability.² The case was filed in the U.S. District Court for the Southern District of Mississippi, less than a month before the U.S. Supreme Court issued its highly anticipated ruling in another climate change case, *American Electric Power v. Connecticut*.³

Some may recall *Comer's* roller-coaster past, filled with ups and downs as the case moved through the courts. If not, here is a short recap. The lawsuit was originally filed in 2005 by a group of Mississippi residents who suffered damage during Hurricane Katrina. Those residents (collectively *Comer*) sued a number of energy companies alleging that the companies were responsible for significant greenhouse gas emissions and that their emissions led to an especially ferocious hurricane; therefore, the companies were at least partially responsible for the damages suffered by the property owners. The case alleged liability under both state and federal laws.

But long before the case ever made its way to trial, the case underwent a number of procedural twists and turns that led to its ultimate dismissal. First the district court tossed out the case in 2007 after concluding that the residents did not meet the legal requirements for bringing a case into court (standing) and that the case was too political for the court system (political question). Then on appeal in 2009, a three-judge panel of the U.S. Fifth Circuit Court of Appeals reversed the district court, reinstating the case.⁴ That victory for the residents was short lived however. A few months later the Fifth Circuit voted to re-hear the matter en banc (by the full court – sixteen judges) but lost the needed majority before a decision was reached.⁵ On May 28, 2010, the Fifth Circuit considered its dilemma and concluded that the appeal must be dismissed.⁶ Finally, the Mississippi property owners asked the U.S. Supreme

Court to weigh in on the matter but the Court denied review. The property owners were left with dismissal.

Undeterred, Mississippi residents filed a revamped version of the lawsuit on May 27, 2011 based exclusively on state law claims, and the complaint includes a request that the court determine as a matter of law that federal law does not preempt state law claims. Why is this significant? Because the Supreme Court's June decision in *AEP v. Connecticut* found that efforts underway by the U.S. Environmental Protection Agency to regulate greenhouse gas emissions under the Clean Air Act preempted federal common law claims based on climate change impacts. By relying on Mississippi law, *Comer* hopes to avoid another dismissal. If the case survives, *Comer* holds the potential to significantly shape the evolution of climate change tort litigation. 

Endnotes

1. Research Counsel, Mississippi-Alabama Sea Grant Legal Program.
2. *Comer v. Murphy Oil USA, Inc.*, No. 1:11cv220-HSO-JMR (S.D. Miss. May 27, 2011).
3. *Am. Elec. Power v. Conn.*, 564 U.S. —, 131 S.Ct. 2527 (2011).
4. *Comer v. Murphy Oil USA, Inc.*, 585 F.3d 855 (5th Cir. 2009).
5. After the court voted to rehear the case, an eighth judge recused herself leaving the court with only eight of sixteen judges. Nine judges were needed to constitute a quorum.
6. *Comer v. Murphy Oil USA, Inc.*, 607 F.3d 1049 (5th Cir. 2010).



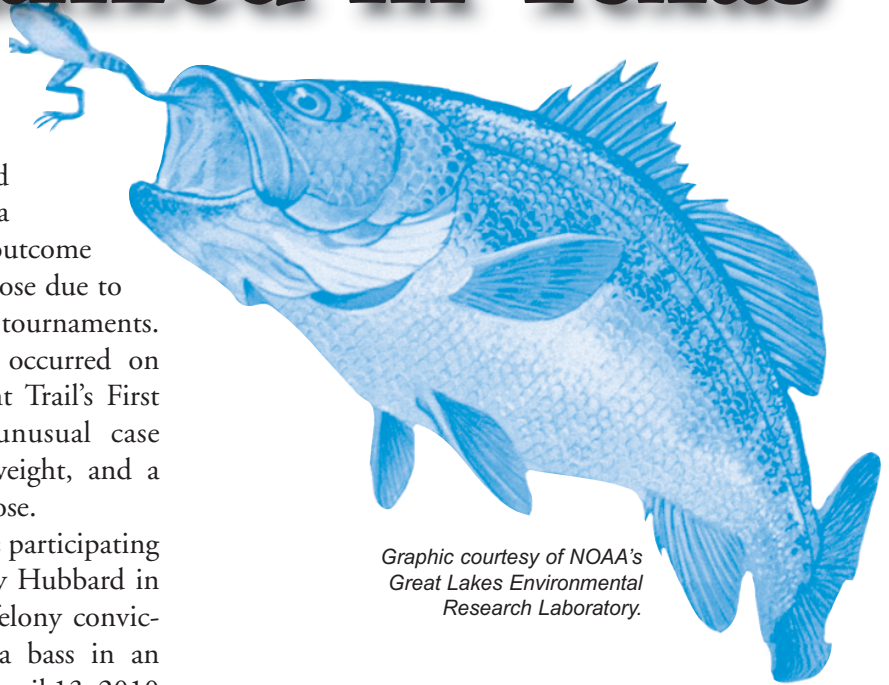
Telling Fish Tales Criminalized in Texas

Barton Norfleet¹

On May 5th, Texas Gov. Rick Perry signed into law a bill that makes it illegal to tell a “fish tale” when that tale may affect the outcome of a fishing tournament.² The new law arose due to growing concern over cheating in fishing tournaments. The most recognized case of cheating occurred on October 24, 2009 during the Bud Light Trail’s First Annual Big Bass Tournament. The unusual case involves an unsuspecting bass, a lead weight, and a semi-pro angler by the name of Robby Rose.

The incident occurred while Rose was participating in the Big Bass Tournament on Lake Ray Hubbard in Texas, and resulted in Rose receiving a felony conviction for stuffing a lead weight inside a bass in an attempt to win a \$55,000 bass boat.³ On April 13, 2010 Rose plead guilty to attempted theft and received a sentence of five years probation, fifteen days in jail, a \$3,000 fine, and revocation of his fishing license for five years.⁴ Rose maintains that he was not cheating to win the prize but rather to make a point and embarrass the sport, a desire he claims arose from his frustration with instances of alleged bullying from tournament officials that he had encountered over the past ten years. Officials first began to suspect Rose of foul play when his heavyweight champion bass plummeted to the bottom of the collection tank while its fellow bass preferred to swim. Rose defended himself by claiming that his bass would have come in second place with or without a belly full of lead, but the Rockwall County District Court disagreed. The Texas Legislature, after learning of other cases like Rose’s, decided to curb these fishy schemes before they become common practice.

The new law prohibits anyone from manipulating the outcome of a fishing tournament by any of the following actions: (1) selling a fish to a participant, (2) accepting a fish that is not their own, (3) presenting a fish as caught in a specific tournament when it was not, (4) altering the length or weight of a fish, or (5) com-



Graphic courtesy of NOAA's
Great Lakes Environmental
Research Laboratory.

mitting any other violation of the Parks & Wildlife Commission rules. The law applies to both saltwater and freshwater tournaments. Minor offenses carry a misdemeanor charge resulting in fines and possible jail time. However, if a tournament prize is worth \$10,000 or more, the charge rises to a third degree felony and is punishable by confinement of no less than two years and fines up to \$10,000.⁵ The new law took effect May 21, 2011.🐟

Endnotes

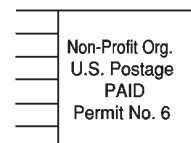
1. 2012 J.D. Candidate, Univ. of Mississippi School of Law.
2. H.B. 1806, 82nd Leg., Reg. Sess. (Tex. 2011).
3. Tom Weir, *Cheater in Fishing Contest Going to Jail*, USA TODAY (April 15, 2010), <http://content.usatoday.com/communities/gameon/post/2010/04/cheater-in-fishing-contest-going-to-jail/1>.
4. Matt Peterson, *Garland Fisherman on the Hook for Jail Time After Cheating in Bass Tournament*, THE DALLAS MORNING NEWS (April 15, 2010), <http://www.dallasnews.com/news/community-news/garland/headlines/20100414-Garland-fisherman-on-the-hook-for-4036.ece>.
5. TEX. PENAL CODE §§ 12.21, 12.34 (2011).



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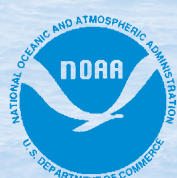
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Mississippi-Alabama Sea Grant Legal Program
Kinard Hall, Wing E, Room 258
P.O. Box 1848
University, MS 38677-1848



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Editor: Niki L. Pace

Publication Design: Waurene Roberson

Contributors:

Travis M. Clements
April Killcreas
Nicholas Lund
Barton Norfleet
Stephanie Showalter Otts

Research Associates:

Ellen Burgin
Christopher Motta-Wurst



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