


# WATER LOG

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## Flood Insurance All Washed Up?

*Hunting and Fishing  
Camp Exemptions May  
Exclude Mississippians  
from Flood Insurance*

# WATER LOG

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## • UPCOMING EVENTS •

The Coastal Society  
Conference  
June 3-6, 2012  
Miami, Florida

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

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

*Cover photograph of Mississippi River flood near Natchez, MS, photo courtesy of National Weather Service, Jackson, MS.*

# Flood Insurance All Washed Up?

## Hunting and Fishing Camp Exemptions May Exclude Mississippians from Flood Insurance

By Travis M. Clements<sup>1</sup>

*A recent Mississippi Attorney General opinion highlights a conflict between state law and Federal Emergency Management Agency (FEMA) regulations, jeopardizing Mississippi's participation in the National Flood Insurance Program. Under current Mississippi law, counties cannot enforce their local flood mitigation ordinances and elevation requirements against hunting and fishing camps. FEMA requested the Mississippi Legislature amend its laws to enforce flood mitigation requirements against all structures, including hunting and fishing camps. If the legislature fails to act by the end of its 2012 Session, FEMA will exclude all Mississippians from the National Flood Insurance Program.<sup>2</sup>*

The National Flood Insurance Program (NFIP), created by the National Flood Insurance Act of 1968, is a federal property insurance program designed to enable property owners in flood-prone areas to purchase government-guaranteed flood insurance.<sup>3</sup> Before the NFIP, flood damage costs were the exclusive burden of flooded property owners, as private insurers either charged exorbitant rates or refused to insure habitually flood-prone areas.<sup>4</sup>

To participate in the NFIP, local communities and the federal government enter into an agreement requiring the communities adopt and enforce a FEMA Floodplain Management Ordinance to mitigate future flooding risks. After the community adopts and enforces the ordinance, the government will offer individual property owners the opportunity to purchase flood insurance from the Program. FEMA administers

the NFIP, and it works with communities to ensure flood ordinances meet minimum requirements and that counties enforce them.

In the wake of Hurricane Katrina, the Mississippi Legislature passed a series of laws requiring five coastal counties – Jackson, Harrison, Hancock, Stone, and Pearl River – enforce heightened wind and flood mitigation requirements contained in the 2003 International Residential and Building Codes.<sup>5</sup> As most hunting and fishing camps are not primary residences, state lawmakers opted to provide an exemption to these requirements. As written, the exemption does not apply solely to post-Katrina codes in these five coastal counties. Rather, the statute applies to hunting and fishing camps statewide, without deference to location.<sup>6</sup>

Following the May 2011 Mississippi River floods, Tom T. Ross, Jr., attorney for the Coahoma County

Board of Supervisors, sent a request to Mississippi Attorney General Jim Hood, asking for clarification of the county's right to enforce its Flood Mitigation Ordinance against hunting and fishing camps. The request specifically asked about the county's right to enforce adoption of the International Building Codes against hunting and fishing camps, as required by the NFIP.

In his August 17, 2011 response, the Attorney General stated that while the hunting and fishing camp exemption in Mississippi Code § 17-2-9(3) "only applies to building codes 'established or imposed under' Sections 17-2-1 through 17-2-5...the wording of this provision [is] somewhat misleading, as building codes are not actually 'established or imposed under' those code sections."<sup>77</sup> He further clarified that "the statutorily created exemption for hunting/fishing camps in § 17-2-9 indicates a clear legislative intent to exempt hunting and fishing camps from locally adopted building codes."<sup>78</sup>

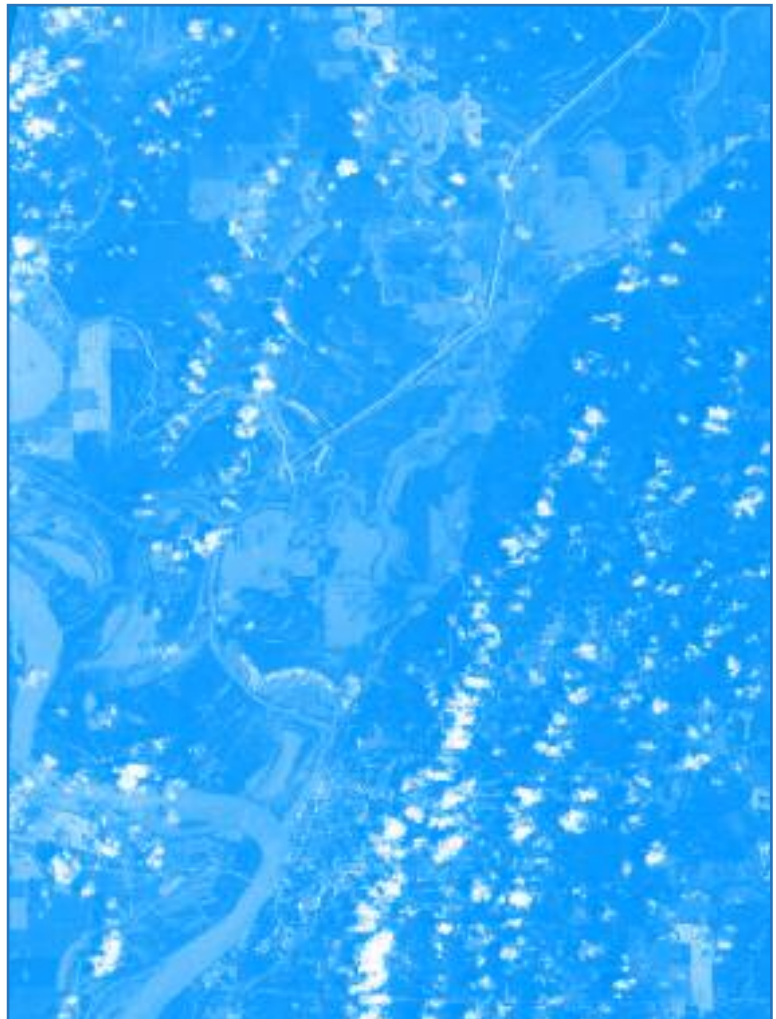
Mr. Ross' final question posed asks if state law pro-

hibits the board of supervisors from enforcing the county's flood ordinances against hunting and fishing camps, contrary to NFIP requirements. The Attorney General responded by stating that despite the county's flood ordinances being an NFIP membership requirement, the county's express authority to adopt ordinances falls within § 19-5-9 and not NFIP requirements. Under the Attorney General's analysis, hunting and fishing camps must be exempt from a county's flood ordinances, as the state exemption covers all local building codes, including the county's § 19-5-9 authority. The Attorney General reserved comment on whether the exemption would affect the county's participation in the NFIP, deeming it "a matter between the federal government, FEMA, MEMA [Mississippi Emergency Management Agency] and the county."<sup>79</sup>

### Conflict with NFIP Requirements

The response to Coahoma County triggered reactions from the state's hunting and fishing lobby, as the cost of modifying many hunting and fishing camps would

*Satellite image of the Mississippi River rising in Vicksburg, Mississippi on May 10, 2011 courtesy of the NASA Earth Observatory. The textured appearance of the muddy river illustrates the turbulent flow of the river..*



far exceed construction costs. In response, Mr. Hood petitioned Mississippi's congressional delegation to obtain a federal waiver of FEMA's Flood Mitigation Ordinance requirements for hunting and fishing camps in the Delta region.<sup>10</sup> The request asked the "federal delegation to help us get FEMA to honor state law and waive enforcement of flood ordinances on flooded fish and hunting camps." Mr. Hood argued that many hunting and fishing camp owners expressed that they do not want flood insurance, even if their structures

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*"If a flood disaster occurs in a suspended community, then most types of federal disaster assistance to individuals for housing and personal property would not be available."*

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qualify. Many of these properties are west of the Mississippi River Levee System and are prone to annual flooding.<sup>11</sup>

David Miller, associate administrator for the Federal Insurance and Mitigation Administration (a FEMA subsidiary), responded to the Attorney General's request, stating that communities have the requirement to adopt floodplain management regulations before joining the NFIP and cannot waive that requirement.<sup>12</sup> If a community cannot enforce its floodplain management plan, it does not comply with the NFIP's requirements. His letter reads, "If a flood disaster occurs in a suspended community, then most types of federal disaster assistance to individuals for housing and personal property would not be available."<sup>13</sup> Mr. Miller gave Mississippi a firm deadline to remedy the conflict between state law and FEMA regulations:

*...should the state want to continue its participation in the NFIP, then Section 17-2-9 of the Mississippi Code must be remedied before the end of the 2012 Mississippi State Legislative Session. Should that not occur, Mississippi communities would be suspended from the NFIP effective on May 5, 2012.*<sup>14</sup>

## Conclusion

The May 5th ultimatum, coinciding with the end of the 2012 Legislative Session, has the potential to affect

every Mississippi property owner that has or wants to purchase flood insurance. Over 300 Mississippi communities with nearly 88,000 flood insurance policies, totaling \$18 billion in coverage, are at risk of flood insurance cancellation.<sup>15</sup> To date, neither FEMA nor Congress has chosen to act on Mr. Hood's request. Mr. Hood continues to seek a diplomatic resolution to the conflict; however, he indicates that the state may pursue a remedy in the court system if the parties cannot agree.<sup>16</sup> FEMA's deadline is quite clear. If the legislature chooses to amend § 17-2-9, FEMA will continue to honor Mississippi's participation in the NFIP. Should the legislature fail to act by May 5, 2012, FEMA will exclude all Mississippi properties from flood insurance availability. As the state has an influential hunting and fishing lobby, it is unclear whether the legislature will act by FEMA's deadline.

*\*The Mississippi Legislature is currently considering legislation to resolve this issue.*

## Endnotes

- 2012 J.D. Candidate, Mississippi College School of Law.
- Chance Wright, *FEMA Replies to AG's Floodplain Request*, THE BOLIVAR COMMERCIAL, Dec. 5, 2011.
- 42 U.S.C. § 4001 et seq.
- 42 U.S.C. § 4001(b).5.; 33 U.S.C. § 1342.
- MISS. CODE ANN. § 17-2-1 et seq.
- MISS. CODE ANN. § 17-2-9(3).
- Applicability of Section 17-2-9 to County Flood Plain Ordinances and Local Building Codes, Miss. Att'y Gen. 2011-00273, 2011 WL 4383412, at \*4.
- Id.*
- Id.* at \*5.
- Press Release, Miss. Att'y Gen., Attorney General Requests Congressional Help in Asking for Federal Waiver of the Flood Mitigation (Aug. 24, 2011) (on file with MASGLP).
- Id.*
- See Chance Wright, *FEMA Replies to AG's Floodplain Request*, *supra* note 2.
- Id.* (quoting Letter from David Miller, Ass't Adm'r, FEMA, to Miss. Att'y Gen. Jim Hood (2011) (on file with MASGLP).
- Id.*
- See Chance Wright, *FEMA Replies to AG's Floodplain Request*, *supra* note 2.
- See Press Release, Miss. Att'y Gen., *supra* note 9.

# BATTLE CONTINUES OVER FLORIDA'S WATER QUALITY STANDARDS

*Photograph of wetlands courtesy of Waurene Roberson.*

**Joanna Wymyslo<sup>1</sup>**

After a district court judge's decision that the state had failed to adequately protect its waterways, Florida became the only state where the EPA sought to impose numeric nutrient limits. However, in a recent turn of events, the State developed its own qualitative water quality standards which could replace the standards established, but not yet implemented by the EPA. The State recently submitted the replacement standards to the EPA for approval in accordance with the Clean Water Act.

## **Background**

Pursuant to Section 303(d) of the Clean Water Act, individual states are required to designate the use or uses of a waterbody; adopt water quality standards to identify waters with insufficient pollution controls to attain or maintain their designated use or uses; and if a waterbody is not supporting its designated use or uses, the state must list that waterbody as impaired (on the state's "303(d) list") and limit the amount of pollutants discharged into those waters in order to meet water quality standards and restore the water quality to attain its designated use or uses. If the U. S. Environmental Protection Agency (EPA) finds that a state has failed to establish criteria that safely support a waterbody's designated use or uses, the EPA must develop the criteria itself, unless the State is able to establish more suitable standards beforehand.

Florida's existing nutrient rule is a qualitative or narrative standard called the "imbalance criterion" which states that "in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural fauna and flora." The state classifies its surface waters according to designated uses, ranging in degree of protection from drinking water

supplies, down to utility and industrial uses. The majority of Florida's waterways are classified as suitable for swimming and fishing. Despite Florida's public policy obligation "to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies, for the propagation of wildlife and fish and other aquatic life, and for domestic, agricultural, industrial, recreational, and other beneficial uses ...," in 2008, the state reported that 1,000 miles of rivers and streams, 350,000 acres of lakes, and 900 square miles of estuaries were "impaired" by nitrogen and phosphorus pollution (also known as "nutrient pollution"). Nutrient pollution causes the formation of byproducts in drinking water which can potentially lead to serious illness, as well as algae blooms which produce toxins which can harm both humans and animals and deplete oxygen needed by aquatic species for survival.

## **Numeric Nutrient Standards**

In 2008, several environmental groups challenged the efficacy of Florida's narrative state water quality standards (the "imbalance criterion") by suing to compel the federal EPA to establish specific numeric nutrient standards for the state. The EPA settled the lawsuit in 2009 by agreeing to establish quantitative criteria within 15 months, noting that specific numeric limits were needed for nitrogen and phosphorus because the state's qualitative rules had failed to prevent water quality problems in Florida's waterways. When the EPA proposed numeric limits, utilities and industry and agriculture groups argued the EPA's limits would be too difficult and expensive to meet. The projected cost of implementation was a source of contention between affected groups, with estimates ranging as

widely as \$4.7 million to \$620 million annually, depending on the source of the cost analysis. Indeed, balancing the need for numeric criteria with the potential price tag was a primary concern among the over 22,000 public comments the agency received on the issue.

The EPA's proposed standards were initially scheduled to be implemented on March 4, 2012. However, on November 10, 2011, the Florida Department of Environmental Protection (FDEP) proposed its own numeric nutrient criteria designed to replace the proposed federal standards and implement the imbalance criterion. After conducting a preliminary review of the FDEP's draft rule, the EPA concluded the "draft rule represents an important opportunity to affirm the agency's support for FDEP's efforts to address nutrient pollution." The EPA then proposed a 90-day delay in implementation of its proposed numeric limits until June 4, 2012, so that FDEP may have additional time to seek approval from the Florida Legislature for its replacement rules. On December 8, 2011, Florida's Environmental Review Commission amended and unanimously approved FDEP's proposed rules, and FDEP submitted the amended rules to the Florida Legislature the next day. Implicitly acknowledging the concerns raised by interested groups upon the introduction of the EPA's proposed numeric limits, when FDEP submitted its proposed rules to the Legislature, it explained that the proposed rules "address the complexity of Florida's various aquatic ecosystems by focusing on site-specific analyses of each water body. ... Additionally, the approved rules are more cost effective than the federal rules while affording the same level of protection."

The Florida House of Representatives and Senate passed the proposal as House Bill 7051, which Governor Rick Scott signed on February 16. Shortly thereafter, a district court held the EPA's proposed numeric standards were necessary for Florida's waters to meet Clean Water Act requirements. District Judge Robert Hinkle ordered those rules for springs and lakes become effective on March 6, but overturned the agency's standards pertaining to the stream criteria and default downstream-protection values for unimpaired lakes. Judge Hinkle also ordered the inland waters rule to take effect on March 6, but the EPA extended the effective date to July 6, 2012 in order to "avoid the confusion and inefficiency that may occur should Federal criteria become effective while State criteria are being finalized by the State, submitted to the EPA,

and reviewed by the EPA." On February 20, 2012, FDEP submitted the State's ratified water quality standards to the EPA for review pursuant to CWA section 303(c).

### Environmental Challenges

Several environmental groups, including the Florida Wildlife Federation, the Sierra Club, the Conservancy of Southwest Florida, the Environmental Confederation of Southwest Florida and the St. Johns Riverkeeper, filed a legal challenge alleging FDEP's proposed replacement rules are invalid. In addition challenging the adequacy and scientific validity of the proposed measurements for water quality, the environmental groups argue that the proposed standards are flawed because they are designed to implement the "imbalance criterion" which was arguably ineffective in the past. They argue the FDEP's standards are reactive rather than preventative in that harm to a water's designated use must occur before a violation can be found because, by implementing the "imbalance criterion" ("in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural fauna and flora"), the state's standard "sets the level of violation at the point at which harm to recreational uses of the waters has already occurred, as evidenced by increasing numbers of nutrient-fueled toxic blue-green algae outbreaks and other algae outbreaks...." The administrative hearing on the environmental groups' challenge to the proposed rules began in Tallahassee on February 27, 2012. Initial arguments included testimony from a marine scientist that the State's proposed guidelines would not protect coral reefs or prevent toxic red tides.

### Conclusion

Regardless of the outcome for FDEP's replacement rules, the legal battles over Florida's water quality standards will not soon be over. Should FDEP's replacement rules be rejected and any part of the federal EPA's rules take effect, state officials, utility and industry groups are maintaining a lawsuit against the EPA based on the agency's 2009 determination regarding numeric nutrient standards. The groups are alleging that Florida's water quality has actually improved and the EPA's 2009 proposed rules would be too expensive to implement. Conversely, should FDEP's proposed replacement rules be approved, the environmental groups will sue the EPA and argue the EPA's 2009 determination was based on sound science.<sup>15</sup> Given

*Agency Battle, continued on p.12*

# OIL SPILL MDL: UPDATE

April Hendricks Kilcreas<sup>1</sup>

A nonjury trial was scheduled in the U.S. District Court for the Eastern District of Louisiana to determine which parties must share liability for the April 20, 2010 explosion of the Deepwater Horizon in the Gulf of Mexico. Over 350 lawsuits by business and property owners along the Gulf Coast have been consolidated into a single multi-district litigation proceeding in order to simplify the pre-trial activities for the cases pending against BP, Transocean Ltd., and Halliburton Company. At the time of the explosion, BP had leased the Deepwater Horizon oil rig from Transocean, and Halliburton regularly offered cementing services to the oil well. The trial, scheduled to begin on February 27, would have identified which of these entities will share liability for the damages alleged by the plaintiffs who have come forward since the 2010 explosion. Since November 2011, BP and the other defendants have made several motions to dismiss large numbers of the pending lawsuits against them, with varying amounts of success. This article provides an update of recent case activity leading up to February 27th.

## **Transocean and Halliburton Indemnification**

In April 2011, BP sued Transocean and Halliburton to recover a portion of the damages and costs associated with the oil spill; however, in January 2012, BP was ordered to indemnify both Transocean and Halliburton for third party claims for compensatory economic damages stemming from the oil spill.<sup>2</sup> Consequently, BP will be unable to collect any funds from these oil spill defendants to cover the \$40 billion in cleanup costs and economic losses it has incurred following the 2010 blowout and will be responsible for all economic damages resulting from the spill. Despite this ruling, both Transocean and Halliburton potentially remain liable for punitive damages and civil penalties under the Clean Water Act, and their liability in these respects will be determined during the February 27 hearing. Because the penalties imposed under the CWA are designed to punish polluters, the contracts between BP, Transocean, and Halliburton could not extinguish any party's liability for punitive damages. Under its contract with BP, Transocean accepted responsibility for any damages relating to equipment losses, personal injury, or wrongful death; the company's liability for these claims is no longer at issue.

## **Cost Recovery and Settlement Efforts**

In early January, BP filed a lawsuit against Halliburton seeking recovery of all the costs that BP has incurred in its cleanup efforts in the Gulf. BP has indicated that, in the aftermath of the oil spill, the company has incurred approximately \$42 billion in expenses related to repairing the blown out well, compensating affected Gulf Coast residents, paying government-imposed fines, and conducting cleanup activities in coastal waters.<sup>3</sup> Supporting its request that Halliburton should reimburse BP for these



incurred costs, BP argued that the cement seal that Halliburton placed on the oil well was defective and was a contributing cause of the April 2010 blowout. BP's most recent request for reimbursement from Halliburton is an expansion of a prior lawsuit filed in April 2010 in which BP sought payment from Halliburton for portions of the costs and expenses that BP would incur as the result of the spill.

In January 2012, Mitsui & Co.'s MOEX Offshore 2007 LLC agreed to split \$90 million between the U.S. government and to the five coastal states affected by the oil spill as a settlement of Clean Water Act violations.<sup>4</sup> Under the terms of the settlement agreement, MOEX, a minority owner of the Macondo well, agreed not to admit to liability under the CWA while also committing to pay \$45 million to the U.S. and \$25 million to the impacted states, with an additional \$20 million to be used for land acquisition projects. In May 2011, MOEX settled claims made against it by BP for \$1 billion. Claims against BP, Transocean, and Anadarko, which held a 25% interest in the well, for CWA violations are still pending and will be considered in the February 27 hearing. Should these defendants be held liable for the CWA violations, the U.S. will be entitled to levy fines against each defendant amounting to approximately \$1,100 per barrel of oil released into the Gulf without first bearing the burden of establishing each defendant's liability. If, however, the defendants are found to have been grossly negligent with regard to the blow out and resulting spill, the government can then seek fines up to \$4,300 per barrel of oil spilled, meaning that BP, Transocean, and Anadarko potentially faces fines of up to \$17.6 billion.<sup>5</sup>

### Conclusion

As a result of these orders, BP and other defendants in the oil spill litigation are now subject to punitive damages for their actions leading to the Deepwater Horizon explosion. The defendants, however, did experience multiple successes in dismissing claims against them by certain classes of plaintiffs. Despite this success, BP and the additional responsible parties remain liable for billions of dollars of property damage, lost income, and natural resource damage. The pending Deepwater Horizon litigation illustrates the importance of balancing the need for drilling against the dangers associated with drilling complications. In February, BP began indicating its desire to reach a settlement as the company continues to prepare for trial. A significant uncertainty that BP faces in the upcoming trial is whether it will be

liable for gross negligence, which carries penalties of up to \$4,300 per barrel of oil spilled under the CWA, or simple negligence, which could result in a lesser fine of only \$1,100 per barrel spilled. With almost five million barrels of oil spilled in the Gulf, the difference between simple negligence and gross negligence is approximately \$16 billion dollars in fines, in addition to the penalties that could be levied under other environmental statutes and the damages likely to result from economic losses.<sup>6</sup>

In December, prosecutors took initial steps in preparing criminal charges against BP employees for their actions contributing to the oil spill. Though significant information is not yet available as to the potential scope of the criminal prosecutions, investigators are presently focused on the actions of several Houston-based engineers and their supervisors, alleging that these employees made false representations to regulatory officials as to the safety of drilling processes in the Gulf.<sup>7</sup> These pending criminal charges against BP officials, if filed by prosecutors, would add to BP's potential liability for the spill.

### Endnotes

1. 2012 J.D. Candidate, Univ. of Miss. School of Law.
2. Margaret Cronin Fisk & Allen Johnson Jr., *BP Can't Collect Part of Gulf Spill Costs from Transocean*, THE SAN FRANCISCO CHRONICLE, Jan. 30, 2012. See also Jonathan Stempel, *Halliburton Wins Ruling vs. BP over Gulf Oil Spill*, REUTERS, Jan. 31, 2012.
3. *BP Sues Halliburton Over Oil Spill Bill*, CHICAGO TRIB. Jan. 3, 2012.
4. Margaret Cronin Fisk, *U.S. Files Motion Seeking MOEX Accord in BP Spill Case*, BLOOMBERG, Feb. 17, 2012.
5. *Id.*
6. Emily Pickrell, *Incentives to Settle Spill Case Loom Large*, THE HOUSTON CHRONICLE, Feb. 10, 2012.
7. Tom Fowler, *Criminal Charges Are Prepared in BP Spill*, THE WALL STREET JOURNAL, Dec. 29, 2011.

# BP SETTLES PORTION OF CLAIMS

April Hendricks Kilcreas<sup>1</sup>

The trial scheduled for February 27th in New Orleans has been postponed as plaintiffs weigh the options of pursuing litigation or accepting a recently announced settlement with BP. On March 2nd, BP announced that it had reached a settlement agreement with thousands of individuals and businesses impacted by the Deepwater Horizon explosion. Because plaintiffs have been given the option to opt out of the settlement and proceed with litigation, the final amount of the agreement has yet to be determined. The terms of the agreement do not place a specific cap on the monetary total that BP will ultimately pay; however, BP officials have indicated that the company expects to pay approximately \$7.8 billion to cover the plaintiffs' claims, which include only lawsuits for economic loss and medical monitoring costs.<sup>2</sup> This settlement is intended to cover damages suffered by those who both lost business and income and experienced property damage due to the spill. Plaintiffs eligible to take part in the settlement include seafood processors, restaurants, hotels, and business and private property owners along the coast, in addition to thousands of fishermen whose livelihoods were negatively impacted by the oil spill.

BP has elected to include medical claims arising from exposure to oil and chemical dispersants in its settlement agreement. Individuals, including cleanup workers, suffering from health-related injuries or who are at risk for developing health conditions in the future as a result of the oil spill may remain eligible for medical consultations for the next 21 years.<sup>3</sup> To receive compensation under this agreement, claimants must be examined by a health-care practitioner designated by the court and subsequently be approved by a claims administrator, a process that could prove to be extremely time-consuming and complicated for claimants. However, the fact that BP included medical claims in the settlement agreement is a clear success for

plaintiffs alleging medical damages, which are difficult to establish at trial, particularly considering the fact that the harm associated with exposure to dispersants and the oil is not clearly established.

To date, BP has paid \$6.1 billion to satisfy 220,000 claims made through the Gulf Coast Claims Fund, and the money remaining in this account will likely be dedicated to paying the \$7.8 billion settlement.<sup>4</sup> In terms of settling claims filed by individuals and businesses, BP will ultimately pay far less than the \$20 billion that the company initially set aside for third party claims. The \$12 billion remaining in the trust fund after the settlement is paid could be used to settle the lawsuits filed by the federal government, coastal states, and the surviving families of the workers killed during the explosion. Though this settlement may appear to be a small victory for the oil company, BP remains liable for civil and criminal penalties imposed by state and federal governments that could ultimately cost the company up to \$37 billion dollars, if not more.<sup>5</sup>

The terms of the agreement cannot be finalized until U.S. District Judge Carl Barbier approves a formally submitted settlement agreement. Once the settlement has been approved, BP can begin compensating plaintiffs who have opted to settle in favor of pursuing their claims in court.

## Endnotes

1. J.D. Candidate, May 2012, Univ. of Miss. School of Law.
2. Tom Fowler, *BP, Plaintiffs Reach Settlement in Gulf Oil Spill Case*, WALL STREET JOURNAL (March 4, 2012).
3. *BP oil spill settlement includes health monitoring and claims process for proven illnesses*, WASHINGTON POST (March 4, 2012).
4. Treflis Team, *BP Heads to \$58 on Spill Settlement and Rising Oil Prices*, FORBES (March 8, 2012).
5. *Id.*

# Property Owners Dispute Harbor and Marina Construction

April Hendricks Kilcreas<sup>1</sup>

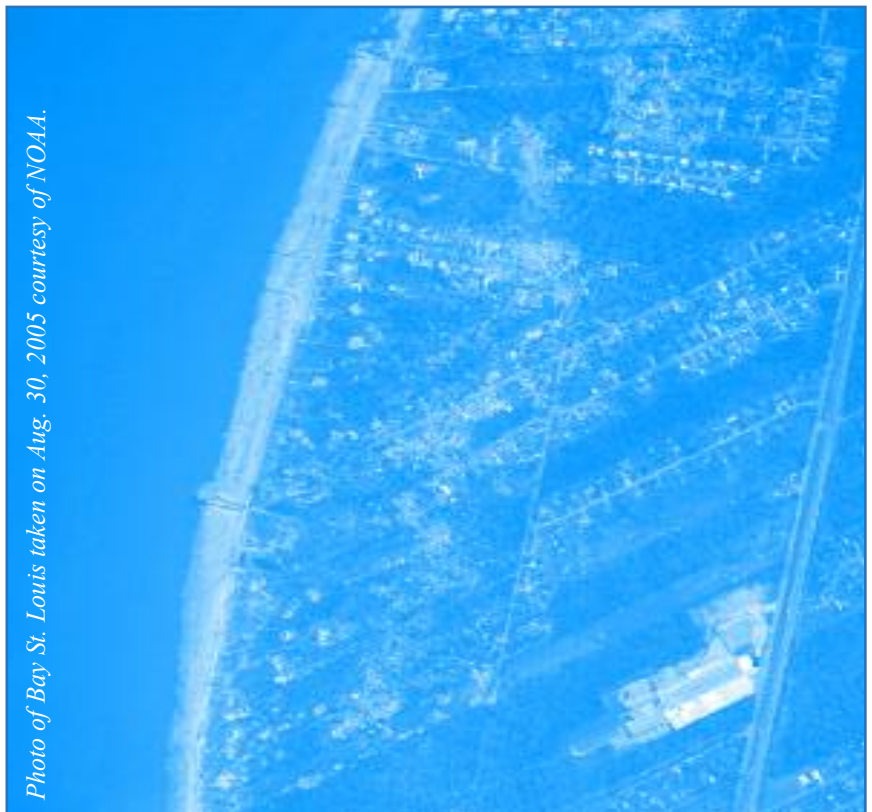
In June 2011, Bay St. Louis residents Ken, Ray, and Audie Murphy filed a lawsuit against the city and Mississippi Secretary of State Delbert Hosemann in order to halt plans for the construction of the city's proposed multi-million dollar harbor and marina project, alleging that portions of the marina will encroach upon the family's private property. For the last several years, Bay St. Louis (City) has planned to construct a harbor and marina at the end of Main Street, and the contractors for the city were scheduled to begin constructing a vehicle ramp between Beach Boulevard and the marina during the first week of January.<sup>2</sup> The City's plan, however, was in direct conflict with the Murphys' goal to construct a restaurant and hotel on the same property, the site where Dan B's tavern was located prior to its destruction in Hurricane Katrina. Realizing that the city planned to go forward with the marina's construction despite the pending lawsuit, the Murphys removed the contractors' surveying equipment, replacing it with "No Trespassing" signs. Until the chancery court resolves the dispute between the Murphys and Bay St. Louis, the Murphys have pledged to block any attempts by city contractors to enter or begin construction on the disputed parcel of land. On January 10th, the Murphys filed a restraining order against the City and the Secretary of State's office in an attempt to ensure that no government officials enter the property before the chancery court hears the case.<sup>3</sup>

## Public Trust Tidelands

The Murphys contend that Hosemann improperly classified the family's private property as tidelands subject to the Mississippi Public Trust Tidelands Act.<sup>4</sup> Under the Public Trust Doctrine, the state of Mississippi is the titleholder to all submerged lands within the state for the benefit of the public. Mississippi's public trust

lands include those subject to the ebb and flow of the tide, up to the mean high tide line. Any land located above the mean high tide line is subject to private ownership, and any owner of such property has littoral rights in the waterfront area of the land. Having littoral rights confers upon the property owner certain privileges to use and access the waterfront, including constructing piers and boathouses over the water. Under the Public Trust Tidelands Act, the Secretary of State is authorized to lease tidelands to private entities. In the Bay St. Louis dispute, the property at the center of this controversy is located between the seawall and the mean high tide line. The Murphys own the property above the seawall and also claim ownership of the property located between the seawall and the mean high tide line.<sup>5</sup> Any land located seaward of the mean high tide line is clearly owned by the state for the benefit and use of the public, but the

*Photo of Bay St. Louis taken on Aug. 30, 2005 courtesy of NOAA.*



Secretary of State's office has declared that title to all land located seaward of the Murphys' seawall belongs to the state.

After identifying the disputed property as subject to the Tidelands Act, Secretary of State Hosemann leased the land to the City of Bay St. Louis for the development of a harbor and marina, and this transaction is at the heart of the dispute between the Murphys, the City, and the Secretary of State. The Murphys characterize Hosemann's decision to lease the land to the City as the improper taking of property for government use without adequate compensation, though the state offered the family an undisclosed sum of money for the disputed land in August 2011.<sup>6</sup> Hosemann disputes the plaintiffs' contentions that his actions were arbitrary, capricious, and an abuse of power and requested that Attorney General Jim Hood file a motion in the Hancock County Chancery Court action to dismiss the Murphys' claims.<sup>7</sup> The chancery court is presently scheduled to hear the parties' arguments with regard to that motion on February 24, 2012.

### Conclusion

The City stands to lose much time by waiting to begin construction of the marina and has notified the contractor that it may continue working on the site, regardless of the Murphys' efforts to exclude them from the

property. In response to the City's actions, the Murphys have threatened to name Key Construction as a co-defendant in the chancery court proceedings and, on January 10th, filed trespassing charges against the construction company. The City has repeatedly characterized the Murphys' actions as a hindrance to the construction of a marina that could provide significant economic benefits for the Gulf Coast community. Should the contractor have to re-survey the land due to the Murphys' disruption of the surveying markers, the City has threatened to file a lawsuit against the family seeking reimbursement of the taxpayer expenses used to pay the contractors for additional time and surveying efforts.<sup>8</sup>

### Endnotes

1. 2012 J.D. Candidate, Univ. of Miss. School of Law.
2. Geoff Belcher, *Bay man vows to halt work on marina*, THE SEA COAST ECHO, Jan. 6, 2012.
3. Geoff Belcher, *Murphy's file restraining order against Sec. of State, City of Bay St. Louis*, THE SEA COAST ECHO, Jan. 10, 2012.
4. Belcher, *supra* note 2.
5. *Al Showers, Property dispute could delay Bay St. Louis Marina project*, WLOX News Online.
6. Belcher, *supra* note 3.
7. Belcher, *supra* note 2.
8. Belcher, *supra* note 2.

*Agency Battle, continued from p. 7.*

the numerous challenges being raised, and the significance of the interests at stake, the ever-evolving fate of Florida's water quality regulation remains unclear.

### Endnotes

1. J.D., Florida Coastal School of Law; LL.M., Lewis and Clark Law School. Ms. Wymyslo is currently an attorney in Florida.
2. Genevieve Bennett, *U.S. Feds Change Course: Will Let Florida Set Own Water Standards*, ECOSYSTEM MARKETPLACE, Dec. 15, 2011.
3. 33 U.S.C. § 1313; 40 C.F.R. § 130.7(b)(4).
4. FLA. ADMIN. CODE ANN. r. 62-302.530(47)(b).
5. Fla. Stat. § 403.021(2).
6. Bruce Ritchie, *State Officials, Industry and Utility Groups Press Case in Federal Court Against Water Rules*, THE CURRENT, Jan. 9, 2012.
7. 75 Fed. Reg. 75762 (Dec. 6, 2010) (codified 40 C.F.R. §131.43).
8. Paul Quinlan, *Last-Minute Lobbying Over EPA's Water-Quality Rules for Fla. Focuses on Costs*, NYTimes.com, Nov. 15, 2010.
9. Letter from Nancy K. Stoner, Acting Assistant Administrator, U.S. EPA, to Herschel T. Vinyard, Secretary, Fla. Dept. of Env'tl. Protection (Nov. 2, 2011) (on file with author).
10. 76 Fed. Reg. 79604 (Dec. 22, 2011).
11. Letter from Herschel T. Vinyard Jr., Secretary, Florida Department of Environmental Protection, to Mike Haridopolos, President, Florida Senate, and Dean Cannon, Speaker, Florida House of Representatives (Dec. 9, 2011) (on file with the author).
12. 77 Fed. Reg. 13496 (Mar. 7, 2012); Florida Wildlife Fed'n v. Jackson, Nos. 4:08cv324 et al., 42 ELR 20048 (N.D. Fla. Feb. 18, 2012).
13. Petition to Invalidate Existing and Proposed Rules of the Florida Department of Environmental Protection at 6, Florida Wildlife Fed'n, Inc. et al., v. Florida Dept. of Env'tl Protection, No. 11-006137RP (Fla. Div. of Admin. Hearings Dec. 1, 2011).
14. Bruce Ritchie, *Hearing Begins on Challenge to Proposed State Water Quality Rules*, THE CURRENT, Feb. 27, 2012.
15. Bruce Ritchie, *State Officials, Industry and Utility Groups Press Case in Federal Court Against Water Rules*, THE CURRENT, Jan. 9, 2012.

# COURT RULES ON KEMPER COUNTY PROJECT

Christopher Motta-Wurst<sup>1</sup>

Last year, the Sierra Club sought an injunction on behalf of its members against the U.S. Department of Energy (DOE) over funding to Mississippi Power Company for a new coal-fired power plant being built in Kemper County, Mississippi (the Kemper Project). The Sierra Club hoped to prevent the DOE from providing funding to Mississippi Power Company for the Kemper Project. In November, the U.S. District Court for the District of Columbia (D.C. District Court) denied the Sierra Club's motion for a preliminary injunction against the DOE regarding the use of federal funds and loan guarantee for the Kemper Project. The court denied the motion because it found that the Kemper Project would continue regardless of DOE funding, so an injunction against the DOE would do nothing to help the members of the Sierra Club that were allegedly injured by the project. The court also granted the DOE's motion to dismiss, dismissing only those claims that relate to loan guarantees for the Kemper Project.

## Background

Mississippi Power Company has started the construction of a coal power plant in Kemper County, Mississippi that is projected to cost more than \$2 billion. Under the Clean Coal Power Initiative (CCPI) created by the Energy Policy Act of 2005, the U.S. Secretary of Energy may give financial assistance to projects that meet certain criteria. This includes projects that "generally advance efficiency, environmental performance, and cost competitiveness well beyond the level of technologies that are in commercial service or have been demonstrated on a scale of viable commercial service."<sup>2</sup> The Energy Policy Act of 2005 also created a loan guarantee program which gives the Secretary of Energy the authority to make loan guarantees for projects that "avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases and employ new or significantly

improved technologies as compared to commercial technologies currently in service."<sup>3</sup>

Before the DOE can provide CCPI financial assistance or a loan guarantee, it must issue an Environmental Impact Statement (EIS) evaluating the project's environmental effects, in accordance with the National Environmental Policy Act (NEPA). In May 2010, the DOE issued an EIS, which the Sierra Club claims is legally insufficient. The Sierra Club requested the court issue a preliminary injunction preventing DOE from disbursing any more federal funds in connection with the project as well as preventing the DOE from issuing any loan guarantee for the project, pending a decision on the merits.<sup>4</sup> In response, the DOE requested the court dismiss the claims, arguing that no final agency action had occurred and the matter was not ripe for judicial review.



*Photo of a coal-burning power plant courtesy of U.S. Geological Survey.*

### Preliminary Injunction

Until recently, a request for injunction required a court to consider four factors on a sliding scale where a strong factor could overcome a weak factor. These four factors are: “(1) a substantial likelihood of success on the merits; (2) that the moving party would suffer irreparable injury if the relief were not granted; (3) that the relief would not substantially injure other interested parties; and (4) that the public interest would be furthered by the relief.”<sup>5</sup> However, the U.S. Supreme Court recently held that the irreparable harm factor is independent and must be met to grant an injunction.<sup>6</sup> Two D.C. District Court justices in a concurring judgment have said that likelihood of success on the merits is also an independent factor that must be met for a preliminary injunction to be granted, but this question has not been completely settled by the D.C. District Court.<sup>7</sup>

In examining the Sierra Club’s likelihood of success on the merits, the court looked at whether the Sierra Club had proper standing in order to sue. If it was unlikely that the Sierra Club could establish standing, it would be equally unlikely that they could be successful since without standing they cannot sue. According to the court, the Sierra Club’s motion for preliminary injunction struggles to meet proper standing because of issues of causation and redressability and therefore would not have a substantial likelihood of success on the merits.

Causation examines whether the acts of the defendant that are being challenged (as opposed to the acts of a third party) are likely to cause injury to the plaintiff. Redressability examines whether the relief sought will likely alleviate the injury alleged by the plaintiff. In this case, the Sierra Club must show that the acts of the DOE, not Mississippi Power, are going to cause injury to their members. They also must show that if the court granted an injunction, their members would no longer be injured by the actions of Mississippi Power. The court did not find that the Sierra Club could reach its burden of proof because Mississippi Power provided a sworn affidavit of a corporate official saying that they would continue constructing the Kemper Project even if the DOE received a temporary or permanent injunction from dispersing federal funds to them. Therefore, “if Mississippi Power would go forward with the project at this time regardless of whether an injunction is ordered, then an injunction would not redress Sierra Club members’ injuries.”<sup>8</sup>

If the Sierra Club cannot show likelihood of success on the merits, a court normally does not consider irreparable harm, but here, the court considered this prong of the test anyway. The irreparable harm test yielded basically the same examination as likelihood of success. The Sierra Club could not meet the burden of showing that “irreparable injury is likely in the absence of an injunction.”<sup>9</sup> According to the court, Mississippi Power has signed a sworn affidavit that they will continue with or without DOE funding and the Sierra Club has not provided any evidence to rebut this assertion. Therefore, if Mississippi Power is going to continue with the Kemper Project regardless of DOE funding the Sierra Club’s members would not have their alleged injuries alleviated by an injunction.

### Motion to Dismiss

In addition to Sierra Club’s request for an injunction, the court also considered the DOE’s motion to dismiss. The DOE filed a motion to dismiss because “it has not taken a final agency action with respect to a loan guarantee for the Kemper Project and, similarly, that the Sierra Club’s challenge to a loan guarantee is not ripe.”<sup>10</sup> There is no final agency action and a challenge cannot be ripe until resources have been “irretrievably committed.”<sup>11</sup> The DOE had yet to take the final step in deciding whether to issue the loan guarantee so the court ruled in favor of the DOE saying that “until DOE actually commits to a loan guarantee, it is not relevant that DOE has committed other resources to the Kemper Project or that DOE seems to the Sierra Club to have made up it’s mind.”<sup>12</sup>

### Endnotes

1. 2012 J.D. Candidate, Univ. of Miss. School of Law.
2. *Sierra Club v. U.S. Dept. of Energy*, Civil Action No. 11-514, 2011 WL 5822140, 1 (D. D.C. Nov. 18, 2011). See also 42 U.S.C. § 15962(a).
3. *Id.* at 1.
4. *Id.* at 3.
5. *Id.* at 3.
6. *Id.* at 3. See also *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008).
7. *Id.* at 3. See also *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1293 (D.C. Cir. 2011) (Kavanaugh, J., concurring).
8. *Id.* at 7.
9. *Id.* at 8.
10. *Id.* at 10.
11. *Id.* at 12.
12. *Id.* at 11.

# MS/AL Legislative Updates

*A summary of legislation enacted by the Mississippi and Alabama Legislatures during the 2011 session.*

*2011 Ala. Law Ch. 150 (S.B. 221)*  
Relating to Coosa County, provides for regulation of a private water system that purchases water from a municipal water system by the municipality that supplies the water and not a Public Service Commission.

*2011 Ala. Law Ch. 294 (S.B. 170)*  
Prohibits altering the identification numbers and registration of boats, including outboard motors, parts, and vessel trailer, and violations resulting in criminal penalties including illegal possession, and possible forfeiture under certain conditions.

*2011 Ala. Law Ch. 293 (S.B. 84)*  
Creates “Landowners Protection Act,” which limits the liability of landowners who lease property for hunting or fishing purposes.

*2011 Ala. Law Ch. 336 (S.B. 342)*  
Requires any public water works board in a Class 1 municipality in the state to pay interest per annum on all customer security deposits required for services.

*2011 Ala. Law Ch. 560 (H.B. 333)*  
Increases certain saltwater bait license fees; provides for the expiration date and purchase of license for a new place of business; provides the duties of licensees and the regulation of bull minnow traps; and further regulates the sale of dead shrimp, the use of certain nets, and the number of standard shrimp baskets which may be used.

*2011 Ala. Law Ch. 543 (S.B. 466)*  
Proposes constitutional amendment to provide for the transfer of the assets and liabilities of the Water and Sewer Board of the City of Prichard to the Board of Water and Sewer Commission of the City of Mobile, presently known as the Mobile Area Water and Sewer System.

*2011 Ala. Law Ch. 682 (S.B. 49)*  
Exempts farm-raised yellow perch from a prohibition against sale under certain conditions.

*2011 Miss. Law Ch. 329 (S.B. 2957)*  
Excludes funds derived from fishing license sales of the Department of Marine Resources from the definition of state-source special funds.

*2011 Miss. Law Ch. 326 (S.B. 2958)*  
Clarifies the boundaries of marine waters where commercial fishing is prohibited.

*2011 Miss. Law Ch. 355 (H.B. 345)*  
Extends the date of the repealer on the provision of law providing for an exemption from water well contractor’s licensure for water wells constructed for irrigation on the driller’s farm.

*2011 Miss. Law Ch. 401 (H.B. 761)*  
Revises the procedure required to object to a coastal wetlands permit application related to activities on coastal wetlands.

*2011 Miss Law Ch. 394 (H.B. 762)*  
Provides that the date of review for

a complete coastal wetlands permit application begins on date of the last amendment to the application.

*2011 Miss. Law Ch. 412 (H.B. 765)*  
Allows applications for live bait camps to be submitted at anytime.

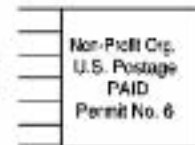
*2011 Miss. Law Ch. 417 (H.B. 768)*  
Designates the first weekend of “National Fishing and Boating Week” in June of each year as “Free Fishing Weekend” and any person may saltwater sport fish without a license during that weekend.

*2011 Miss. Law Ch. 450 (S.B. 2959)*  
Increases amount of shrimp that a person may take for personal consumption from certain locations.

*2011 Miss. Law Ch. 521 (H.B. 1181)*  
Authorizes the Department of Wildlife, Fisheries, and Parks, with the approval of the Mississippi Commission on Wildlife, Fisheries and Parks, to conduct a pilot program to lease lands within certain state parks for commercial development compatible with outdoor recreational purposes and accessible to the general public. Establishes the process for creating leases and a state park endowment fund. Creates task force to make recommendations on the infrastructure needs and development in state parks, a dedicated source of revenue for state parks, the feasibility of electric power associations operating electric transmission lines within state parks, and the feasibility of establishing a separate department of parks and tourism in state parks.



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